

Investor Lawsuit Filed Against Acadia Healthcare Company, Inc. After Reports Alleging Medically Unnecessary Involuntary Hospitalization of Psychiatric Patients

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October 29, 2024



On October 21, 2024, a class action complaint was filed in the U.S. District Court for the Middle District of Tennessee (the “Complaint”) against Acadia Healthcare Company, Inc. (“Acadia” or the “Company”) and various of Acadia’s executives (together with Acadia, the “Defendants”), alleging securities fraud under the Securities Exchange Act of 1934 and asserting a class period of between February 28, 2020 and October 18, 2024, inclusive (the “Class Period”).¹

The gravamen of the Complaint’s allegations is that Acadia hid from investors its alleged practices of locking up psychiatric patients against their will—when detaining them was not medically necessary—in order to maximize insurance payouts and thereby boost the Company’s revenues. Furthermore, the Complaint alleges that when these practices were revealed, Acadia’s stock price dropped, harming investors. The case has been assigned to Judge Aleta Arthur Trauger, a Clinton appointee, and Magistrate Judge Jeffrey S. Frensley.

The Complaint asserts that Acadia operates 253 behavioral health facilities with over 11,000 beds in 39 states and Puerto Rico, providing services such as inpatient psychiatric hospitals, specialty treatment facilities, residential treatment centers, and outpatient clinics.

On September 1, 2024, the *New York Times* published an article on an investigation it conducted of Acadia (the “Article”), which the Complaint cites at length. The Article noted that since the pandemic, “the [C]ompany’s revenue has soared,” but warned that Acadia had “lured patients into its facilities and held them against their will, even when detaining them was not medically necessary.” The Article stated that in 12 states, “dozens of patients, employees and police officers have alerted the authorities that the [C]ompany was detaining people in ways that violated the law”. Shockingly the Article noted that “patients were often held for financial reasons rather than medical ones” and that “Acadia goes to great lengths to convince insurers that the patients should stay as long as possible”. For example, the Article quoted one former Acadia employee who stated, “[i]f there were insurance days left, that patient was going to be held[.]” The Complaint cited instances from the Article of further alleged mistreatment of patients, including assault and neglect. On September 3, 2024, the first trading day after the publication of the Article, Acadia’s share price fell \$3.72 or 4.5%.

The Complaint alleges that on September 27, 2024, Acadia filed a current report on Form 8-K with the SEC which stated that the Company had “received a voluntary request for information from the United States Attorney’s Office for the Southern District of New York as well as a grand jury subpoena from the United States District Court for the Western District of Missouri [] related to its admission, length of stay and billing practices.” The Company also “anticipate[d] receiving similar document requests from the” SEC and might “receive additional document requests from other governmental organizations.” The Complaint alleges that on this news, Acadia’s stock price fell \$12.38 or 16.4%.

The Complaint alleges that Acadia’s share price closed down \$7.29, or approximately 12.3%, on October 18, 2024, after the *New York Times* reported that U.S. Department of Veterans Affairs was investigating whether the Company had been defrauding government health insurance programs by holding patients longer than medically necessary. This article also noted that agents from the FBI and the inspector general’s office of the federal department Health and Human Services had interviewed, “[s]everal former Acadia employees in Georgia and Missouri.”

The Complaint asserts that a variety of Defendants’ statements, principally sections of the Company’s risk disclosures in SEC filings, were materially false and misleading. While risk disclosures are not necessarily the best statements to hang a case on, it is likely that more statements would be added in a future complaint. Essentially the Complaint alleges that Defendants concealed the Company’s practices from investors, and that investors were harmed after Acadia’s share price dropped on September 1, September 27, and October 18, 2024, when the truth was revealed.

A number of plaintiffs' litigation firms have issued press releases about this case, and the deadline to move for lead plaintiff is December 16, 2024. Notably, several prominent firms known for recently taking on larger, stronger securities fraud class actions—including, e.g., Kessler Topaz Meltzer & Check (co-lead counsel in a \$450 million settlement in 2023 with Kraft Heinz), Robbins Geller Rudman & Dowd (lead counsel in a \$350 million settlement in 2024 with Google parent Alphabet), and Bleichmar Fonti & Auld (lead counsel in a \$420 million settlement in 2022 with Teva)—have issued press releases related to this case.

The interest of many plaintiffs' firms, including firms with a history of recent settlements of over \$100 million, suggests that these firms believe there is significant merit in this case. Several other facts imply that this may be a stronger case.

First, the Complaint alleges that Acadia's share price has fallen more than \$23 per share in total due to revelation of the Company's fraud, representing as much as an over \$2 billion drop in market capitalization, and the alleged Class Period spans more than four years. This suggests that actionable damages may be high enough to result in a high eight-figure recovery or even a larger one. Second, the presence of multiple governmental investigations can help a private case by investors.

Third, there is another securities class action pending—*St. Clair County Employees Ret. Sys. V. Acadia Healthcare Company, Inc.*, No. 3:18-c-v-00988 (M.D. Tenn.)—against the Company in the same U.S. District Court involving somewhat analogous allegations for a class period between April 30, 2014, and November 15, 2018 inclusive. The complaint in that case claims that Acadia misrepresented to investors the quality of its care, the adequacy of its staffing to provide appropriate care, that its facilities were in compliance with relevant regulatory requirements, and that its U.K. business would achieve substantial revenue and earnings growth. Lead plaintiff in this case further alleged that Acadia placed patients with the goal of maximizing profits opposed to the best interest of patients, understaffed facilities, and had no basis to believe its statements about the U.K. business' revenues and earnings. The complaint in this case alleged that Acadia's fraud was revealed through a series of disclosures, which included the release of a short seller report, and an analyst letter on *Seeking Alpha*.

The court in this case denied Acadia's motion to dismiss and later granted class certification in full. With the case proceeding through discovery—with a close of fact discovery set for December 13, 2024, and motions for summary judgment due by May 23, 2025—the case is likely to settle within the next year or two unless Acadia prevails at summary judgment.

However, the factual allegations of the Complaint are similar to those made in a securities fraud case against Universal Health Services ("UHS"), *Teamsters Local 456 Pen. Fund v. Universal Health Services*, No. 2:17-cv-02817-LS (E.D. Pa.), case that did not proceed". There lead plaintiffs alleged that UHS "illicitly bolster[ed]" "financial results" because UHS's

mental health facilities had “manipulated and fabricated patient intake assessments [] in order to admit thousands of patients for psychiatric care that was not medically necessary” and had “ke[pt] patients locked up, regardless of medical necessity, for as many days as insurance would cover.” Like the pending case against Acadia, the complaint in this case alleged that media exposes, here *Buzzfeed* articles, were corrective disclosures and that there were governmental investigations of UHS for related issues. Although the case ultimately settled for \$17.5 million (while the case was on appeal), the court had granted UHS’s motion to dismiss and had denied leave to amend the complaint. While this case was in a different district and circuit, Defendants could argue this should be treated as persuasive authority to the court in the newly filed Acadia case to defeat plaintiffs.

The facts in this newly filed matter are still developing, and time will tell who is appointed lead plaintiff and lead counsel and whether they are able to uncover any further relevant facts through an investigation. Overall, the allegations are interesting (compared to say some dry accounting matter), damages could be large, plaintiffs’ firms are circling, and there is an existing case against the Company with somewhat similar allegations that is rapidly approaching trial. Accordingly, notwithstanding potential pitfalls, there is chance that this could someday result in a sizeable settlement.

Investor Class Action Details

ISS SCAS 

Investor Class Action Details	
Court Venue	M.D. Tenn. — Middle District of Tennessee
Case Number	No. 3:24-cv-01238
Amended Initial Complaint	October 21, 2023
Case Status	Active
Lead Plaintiff Deadline	December 16, 2024

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¹ *Kachrodia v. Acadia Healthcare Company, Inc., et al.*, No. 3:24-cv-01238 (M.D. Tenn.), at ECF No. 7. The same plaintiff had filed a complaint (ECF No. 1) against the Company on October 16, 2024, alleging a class period of between February 28, 2020 to September 26, 2024 inclusive, but the Complaint now alleges a drop in Acadia's share price on October 18, 2024 as a corrective disclosure, which the first complaint did not.

"No portion of this insight constitutes legal advice, and no attorney-client relationship is intended or is established."

Author: Donald Grunewald, Director of Litigation Analysis, ISS SCAS

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Oct. 28, 2024, 4:37 PM PDT

Orthofix Shareholders Sue Over Misstatements on Fired Executives

By Mike Vilensky

- **COURT:** E.D. Tex.
- **DOCKET:** [No. 2:24-cv-00864](#) (Bloomberg Law subscription)

Bloomberg Law News 2024-10-29T09:50:27268002272-04:00

Orthofix Shareholders Sue Over Misstatements on Fired Executives

By Mike Vilensky 2024-10-28T19:37:38000-04:00

- **COURT:** E.D. Tex.
- **DOCKET:** [No. 2:24-cv-00864](#) (Bloomberg Law subscription)

Orthofix Medical Inc. shareholders sued the spine device maker Monday for allegedly misleading investors about executives who took top roles after a merger with medical tech company SeaSpine and were later fired for harassment and other conduct.

The shareholder derivative complaint accuses Orthofix and its current and ex-officers of falsely assuring shareholders that the new management team was committed to conducting business in accordance with ethical and legal standards.

Shareholders Felicia Marti and Guillermo Marti filed the suit in the US District Court for Eastern District of Texas.

The merger was approved in January 2023, but in September of that year Orthofix said it was firing the chief executive, chief financial officer, and chief legal officer, who assumed those jobs at Orthofix after serving in top positions at Seaspine. The company's stock price then dropped by 30.2% from Sept. 11, 2023 to Sept. 12, 2023, the complaint says.

Unbeknownst to Orthofix shareholders who voted to approve the merger, the fired officers had "engaged in repeated inappropriate and offensive conduct," including "harassing" and "inappropriate conduct or statements," the complaint says.

Orthofix officers breached their duties by failing to implement adequate internal controls that would have prevented the new management team from obtaining top jobs and by failing to disclose relevant information about the executives to shareholders before their firing, the complaint says.

“Plaintiffs, would not have approved the Merger had they known the truth about the Company’s inadequate internal controls and the misconduct of Defendants,” the complaint says.

The Martis bring claims for fiduciary breach, unjust enrichment, abuse of control, and violations of the Exchange Act. They’re seeking damages, an order that Orthofix improve its corporate governance, attorneys’ fees, and costs.

Judge James Rodney Gilstrap is assigned to the case.

Orthofix didn’t immediately respond to a request for comment.

A similar suit was filed by an Orthofix investor in August in the US District Court for the Eastern District of Texas.

The Brown Law Firm represents the Martis.

The case is Marti v. Serbousek , E.D. Tex., No. 2:24-cv-00864, complaint filed 10/28/24 .

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Silver Lake's \$1.7 Billion Zuora Deal Hit With Court Challenge

By Mike Leonard

- Lawsuit part of a wave challenging board nomination bylaws
- Activist pressure could have led to fairer deal, investor says

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Silver Lake's \$1.7 Billion Zuora Deal Hit With Court Challenge

By Mike Leonard 2024-10-28T14:09:28000-04:00

- Lawsuit part of a wave challenging board nomination bylaws
- Activist pressure could have led to fairer deal, investor says

Zuora Inc. insiders orchestrated a self-dealing \$1.7 billion sale to Silver Lake after undercutting an activist investor, according to a court filing challenging the transaction.

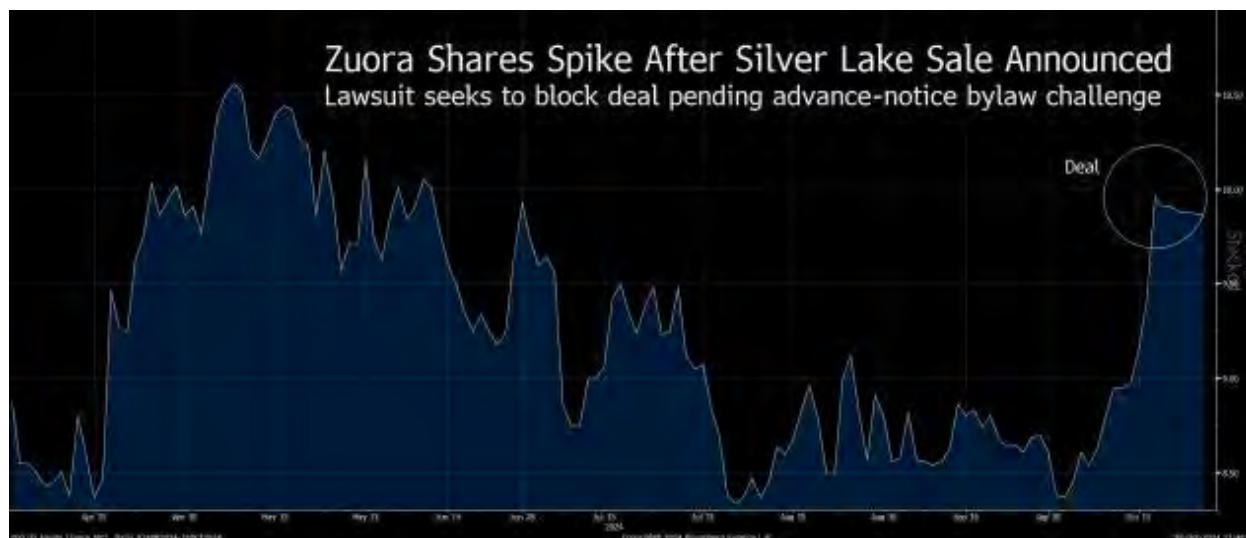
The motion by a Zuora shareholder seeks to block the deal—announced Oct. 17—and fast-track his February lawsuit over the software company's advance-notice director nomination bylaw. Founder Tien Tzuo and his allies wielded the restrictive provisions to “shut down” a bid for board seats by activist firm Scalar Gauge Fund LP that could have pressured Tzuo into a fairer transaction, according to the Oct. 25 filing in Delaware’s Chancery Court.

Silver Lake, which isn’t a party to the court case, declined to comment Monday. Zuora didn’t immediately respond to a request for comment.

The dispute is part of a wave of litigation asserting that corporate boards are digging in against activists emboldened by recent regulatory changes—weaponizing strict reporting requirements and deadlines onerous enough to “choke a horse,” in the words of one court complaint. The cases also raise allegations that companies are brandishing the bylaws to dig for dirt.

Read More: Activist Investors Confront ‘Weaponized’ Board Nomination Bylaws

Companies that have faced advance-notice bylaw suits include Albertsons Cos., Alcoa Corp., Halliburton Co., Peloton Interactive Inc., and others.



A central question has been the extent to which directors can get away with scattershot bylaws—potentially signaling a naked effort to stay in power—if they score one or two direct hits against activists who may also be engaging in gamesmanship, such as by concealing their motives or affiliations.

Delaware's top court provided some guidance on that issue with a complex ruling in July that articulated a novel framework for evaluating advance-notice bylaws. Even a valid bylaw—consistent with a company's charter, permitted by Delaware law, and focused on a proper subject—may be unenforceable if it was adopted solely to undermine a stockholder influence campaign, the court said.

Read More: Nomination Bylaws Must Be Legal and Fair, Delaware Court Says

The lawsuit over Zuora's bylaw, filed in February, described it in those terms. Those "predictions proved correct," according to the new court filing. It says Tzuo is "insulated from activist pressure" after the provisions led Scalar to drop its proxy fight and settle for a single board seat.

As a result, he was able to engineer a deal with Silver Lake that offered "unique benefits for himself at the expense of public stockholders," the filing says. "If the transaction closes before plaintiff's claims are resolved, defendants will avoid scrutiny for clear breaches of Delaware law."

The investor, Eric Johnson, is represented by Block & Leviton LLP and Abbott Cooper PLLC. Tzuo, Zuora, and its other board members are represented by Ross Aronstam & Moritz LLP and Wilmer Cutler Pickering Hale & Dorr LLP.

The case is Johnson v. Abbosh , Del. Ch., No. 2024-0191, motion filed 10/25/24 .

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Oct. 28, 2024, 4:36 PM PDT

3D Printer Company's Investor Fails to Revive Securities Suit

By Quinn Wilson

- Investor didn't identify company's material misstatements
- Plaintiff also failed to preserve her scheme liability claim

Bloomberg Law News 2024-10-29T10:10:40798514501-04:00**3D Printer Company's Investor Fails to Revive Securities Suit****By Quinn Wilson 2024-10-28T19:36:52000-04:00**

- Investor didn't identify company's material misstatements
- Plaintiff also failed to preserve her scheme liability claim

An investor was unable to convince a federal appeals panel to revive her securities fraud claims against Desk Metal Inc. on Monday.

Sophia Zhou can't pursue a scheme liability claim and failed to allege that any of Desktop Metals challenged statements were either materially false or misleading, the US Court of Appeals for the First Circuit said in an opinion. A three-judge panel unanimously affirmed the September 2023 dismissal of the proposed class action Zhou and other investors brought against the 3D printer manufacturer, alleging securities fraud.

"We conclude that Zhou did not preserve a scheme liability claim and that the district court correctly determined that the complaint failed to plead any materially false or misleading statement or omission," Judge Julie Rikelman said.

Zhou sued Desktop Metal after its acquisition of rival EnvisionTEC, which made 3D printers for dental offices, according to the opinion. The defendant company allegedly began illegally manufacturing their new product through a repackaging and false labeling scheme at an unregulated facility.

After one of its dental materials was allegedly weaker than required, the Food and Drug Administration began probing the company, leading to voluntary recalls. This resulted in Desktop Metal's company's stock price declining by 15%.

Desktop Metal asked for the suit to be dismissed on the grounds the investors failed to state a claim pursuant to the Private Securities Litigation Reform Act, Rikelman wrote.

Zhou says the defendant's motion to dismiss targeted only her material misrepresentations and omissions claim under the Securities Exchange Act and the district court erred in dismissing her scheme liability claim, according to the opinion. She also says that she did adequately state a securities fraud claim based on Desktop Metal's material misrepresentations and omissions.

But Rikelman held that Desktop Metal specifically asked for Zhou's complaint to be dismissed in full, according to the opinion. In her opposition brief, Zhou failed to defend why her scheme liability claim should survive the motion to dismiss.

Zhou said her legal theory of liability was presented in earlier filings and Desktop Metal failed to address each point of the claim, according to the opinion. But accepting this position would force a district court to go through the court docket to identify any plausibly alleged legal theories, Rikelman said, regardless of whether or not Zhou raised any defenses in her own response briefs.

"We require parties to make their arguments squarely and distinctly to the district court precisely because '[o]verburdened trial judges cannot be expected to be mind readers,'" Rikelman said.

Zhou also failed to connect "the dots in her complaint" to explain why any omissions about its FDA 510(k) compliance would render Desktop Metal's "accurate statement" about its clearance misleading, Rikelman said.

Judges Gustavo A. Gelpí and Lara E. Montecalvo joined the opinion.

Hagens Berman Sobol Shapiro LLP represents Zhou. Latham & Watkins LLP represents Desktop Metal.

The case is Zhou v. Desktop Metal Inc. , 1st Cir., No. 23-01843, 10/28/24 .

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Spero Therapeutics Dodges Investor Suit Over FDA Approval (1)

B [bloomberglaw.com/product/blaw/bloomberglawnews/class-action/X573O700000000](https://www.bloomberglaw.com/product/blaw/bloomberglawnews/class-action/X573O700000000)

Spero Therapeutics Inc. investors can't proceed with a proposed class action over the drugmaker's optimistic statements about a clinical trial and the prospects for a treatment's FDA approval, a federal court ruled.

The investors didn't adequately allege the company and its top leaders acted with the necessary level of intent for securities fraud, the US District Court for the Eastern District of New York said Monday.

They'd sued Spero after the US Food and Drug Administration gave negative feedback in 2022 about tebipenem pivoxil hydrobromide, an anti-bacterial pill intended to treat complicated urinary tract infections.

Spero's March 31, 2022, announcement that the FDA found "deficiencies" in its new drug application caused an 18% stock drop, closing at \$7.11 per share the following day, according to the investors' suit. And the company's announcement on May 3, 2022, of new negative feedback from the agency and a 75% workforce reduction caused a 64% drop, closing at \$1.85 per share the same day, they said.

Spero executives kept the stock price artificially inflated up to those points with statements about a satisfactory safety profile, milestones reached on the way to a commercial launch, and encouraging FDA interactions, the investors alleged.

Spero sought to dismiss the complaint on grounds of lack of intent, or scienter.

There's no affirmative duty for a company to disclose interim feedback from the FDA, Judge LaShann DeArcy Hall said for the court. In the regulatory approval context, "the threshold for scienter is 'near certainty' that a drug will not be approved," she said.

The number of patients enrolled in the clinical trial, determined in consultation with the FDA, can't be the basis for recklessness here, Hall said. "The Court declines to view the reduced patient population as 'highly unreasonable' when the decision was made with the FDA's guidance," she said.

Frequent meetings with the FDA under a "fast track" approval process don't imply red flags, the judge said. And instances of what the investors call suspicious conduct can be at least as compellingly explained as non-fraudulent, she said.

The investors also failed to establish intent through motive and opportunity, she said.

Pomerantz LLP was lead counsel for the investors. Mintz, Levin, Cohn, Ferris, Glovsky and Popeo PC represented Spero.

The case is In re Spero Theras., Inc. , E.D.N.Y., No. 22-CV-3125, 10/28/24 .

(Updated with additional court analysis beginning in fourth paragraph.)

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Qutoutiao Sees Investor Suit Over In-App Advertising Reinstated

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news.bloomberglaw.com/product/blaw/bloomberglawnews/exp/eyJpZCI6IjAwMDAwMTkyLWQ0OWQtZDU4NC1hMzkyLWRmZmQzMzQ0MDAwMSIsImN0eHQiOiJTTE5XliwidXVpZCI6IktFcEgyc2lvQmt2b1BnRHlxaWwrSHc9PVZqSjY0eTlGRnc2c0IWNHA0U1N4aIE9PSIsInRpbWUiOiIxNzMwMjAwMjc3Mjk2Iiwic2lnIjoIn1ByN084WEpOd3IRUWQ0U0p0Sy9vTDNnVUtRPSIsInYiOiIxIn0=

Securities Law News

A securities suit against Qutoutiao Inc. was improperly dismissed for not pleading sufficient detail about the Chinese news aggregator's alleged advertising-related misstatements accompanying its initial and secondary public offerings, the Second Circuit ruled Monday.

The lower court—the US District Court for the Southern District of New York—held the investors to a heightened pleading standard for fraud, but they had framed their claims for registration statement and prospectus misstatements “in the classic language of negligence and strict liability,” the appeals court said in an unsigned, unpublished opinion.

- The investors alleged in their proposed class action that Qutoutiao misstated that it had effective measures to avoid running advertisements that ran afoul of Chinese government regulations and omitted that much of its revenue came from such noncompliant ads
- The US Court of Appeals for the Second Circuit said that although lead plaintiff James Pappas alleged that Qutoutiao intentionally designed and implemented the underlying strategies, the claims at issue under the Securities Act “charge Defendants with negligently failing to disclose those strategies and their results”
- Those responsible for a registration statement or prospectus “may negligently fail to disclose conduct that another has engaged in intentionally,” said Judges Denny Chin and Michael H. Park, joined by Judge Lewis J. Liman of the Southern District of New York

Freedman Normand Friedland LLP represented Pappas. Simpson Thacher & Bartlett LLP represented Qutoutiao.

The case is *In re Qutoutiao Inc.*, 2d Cir., No. 23-1233, unpublished 10/28/24.

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Oct. 28, 2024, 10:48 AM PDT

YieldStreet Settles Ship Scrap Investment Suit for \$6.2 Million

By Martina Barash

- Investment firm would also waive fees on fraud recoveries
- Investors ask court to give initial approval to settlement

Bloomberg Law News 2024-10-29T09:49:49297382665-04:00

YieldStreet Settles Ship Scrap Investment Suit for \$6.2 Million

By Martina Barash 2024-10-28T13:48:11000-04:00

- Investment firm would also waive fees on fraud recoveries
- Investors ask court to give initial approval to settlement

Alternative investment firm YieldStreet Inc. has agreed to pay \$6.2 million and waive potential fees to settle clients' claims that it misrepresented protections for ship-scraping loan investments later revealed as fraudulent, according to a court filing.

The settlement, reached after almost four years litigation, should be given preliminary approval, the investors told the US District Court for the Southern District of New York on Oct. 25.

The investors sued the firm on behalf of anyone who purchased certain debt instruments in one of YieldStreet's defaulted funds since 2018. The complaint targeted investments in borrower payment dependent notes, defined as debt obligations tied to the performance of an underlying loan. YieldStreet allegedly made misleading statements about investor protections and its own due diligence to induce customers to buy certain products, including the vessel deconstruction investments and a Louisiana oil and gas offering.

In addition to the \$6.2 million cash portion of the settlement, YieldStreet would waive up to about \$2.8 million in fees that could otherwise be charged for future recoveries from loan originators, attorneys, and the alleged perpetrators, according to the approval request. The cash portion alone would be a 12% recovery on the \$50.5 million alleged principal loss, representing an excellent result, the investors said.

The risks of continuing with litigation include YieldStreet's argument that the underlying fraud "was so incredibly sophisticated, it fooled not just Yieldstreet, but Yieldstreet's experts and three unrelated sophisticated lenders who loaned money on the very same ships involved in the marine deconstruction offerings," they said.

The Sonn Law Group PA and Peiffer Wolf Carr Kane Conway & Wise LLP represent the investors. Baker Botts LLP and Goodwin Procter LLP represent YieldStreet.

The case is Tecku v. YieldStreet, Inc. , S.D.N.Y., No. 1:20-cv-07327, motion for preliminary approval 10/25/24 .

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Insider trading claims survive if close in time

 [reuters.com/legal/legalindustry/insider-trading-claims-survive-if-close-time-2024-10-29](https://www.reuters.com/legal/legalindustry/insider-trading-claims-survive-if-close-time-2024-10-29)

Virginia Milstead, Mark Foster, Raza Rasheed

The James R. Browning U.S. Court of Appeals Building, home of the 9th U.S. Circuit Court of Appeals, is pictured in San Francisco. REUTERS/Noah Berger Purchase Licensing Rights  , opens new tab

October 29, 2024 - The 9th U.S. Circuit Court of Appeals held that a plaintiff bringing an insider trading claim under Section 20A of the Securities Exchange Act of 1934 does not need to allege or prove that she sold a security to or purchased a security from the defendant. In *re Silver Lake Group, LLC Sec. Litig*, 108 F.4th 1178 (9th Cir. 2024). Instead, the plaintiff must show that she purchased "the same class" of security "contemporaneously" with the defendant's trading activity, which means that the "transactions" must be "close in time." *Id.* at 1089-90.

The 9th Circuit did not specify how close the plaintiff's trading activity must be to the defendant's to satisfy the rule. However, the emerging consensus among lower courts is that Section 20A's contemporaneous trading rule requires the plaintiff's trades to occur within roughly 24 hours (depending on the circumstances) after the defendant's trades. Moreover, the decision highlights that investors always need to think carefully about whether they possess material, non-public information before trading, even when they are trading in the private market after hours.

The 9th Circuit's decision

Section 20A of the Exchange Act provides that: "Any person who ... purchas[es] or sell[s] a security while in possession of material, nonpublic information shall be liable ... to any person who, contemporaneously with the purchase or sale of securities that is the subject of such violation, has purchased ... or sold ... securities of the same class." 15 U.S.C. § 78t-1(a).

In *Silver Lake*, the plaintiffs alleged that the defendants sold stock in a satellite communications company through after-hours trading after learning that the Federal Communications Commission planned to revoke the company's license to use a particular broadcast frequency. The district court dismissed the complaint.

On appeal, the defendants argued that the plaintiffs could not satisfy Section 20A's contemporaneous trading requirement because they purchased stock on the public market, while the defendants sold stock through private, after-hours trading. Arguing that the contemporaneous trading requirement was meant to "weed[] out plaintiffs who could not

have possibly traded with the" defendant, defendants argued that because the parties' trades were not made in the same market, there was no possibility that plaintiffs bought stock from the defendants, and, therefore, their trades were not contemporaneous.

The 9th Circuit disagreed. The court held that Section 20A does not require that the parties actually traded with one another, or even that it was possible for the plaintiffs to have purchased their securities from or sold their securities to the defendants. Instead, the court held that, notwithstanding the aim of the rule to serve as a proxy for privity, Section 20A's contemporaneous rule "merely requires that the seller and buyer engaged in transactions close in time, not with each other." *Silver Lake*, 108 F.4th at 1090.

In so holding, the court resolved an issue that district courts had previously addressed in the class certification context — whether the contemporaneous trading requires privity or the potential for privity, or merely temporal proximity — an issue the 9th Circuit previously declined to address on appeal. See, e.g., *Turocy v. El Pollo Loco Holdings, Inc.*, No. SA CV 15–1343–DOC (KESx), 2018 WL 3343493, at *17 (C.D. Cal. July 3, 2018).

The court went on to affirm the district court's judgment for the defendants, holding that the plaintiffs failed to sufficiently allege that the defendants traded on material, non-public information.

How close is close enough?

Although the 9th Circuit held that Section 20A does not require contractual privity between the parties, it did not address how close in time the parties' trades must be to satisfy Section 20A's contemporaneous trading rule. While the 9th Circuit has in the past stated that the time period is "not fixed," *Neubronner v. Milken*, 6 F.3d 666, 670 (9th Cir. 1993), it has declined to refine this standard further on previous occasions as well, including, for example, after a Section 20A class of investors was certified in *Turocy v. El Pollo Loco Holdings, Inc.*

Nevertheless, while not uniform in their rulings, lower courts lean toward a rule that a plaintiff must purchase or sell shares within roughly 24 hours (depending on the circumstances) after the defendant's trading activity to satisfy the contemporaneous trading requirement. Indeed, this appears to be the emerging consensus.

While in *Silver Lake* the 9th Circuit explained, "[t]he word 'contemporaneous' denotes a temporal proximity and means 'existing, occurring, or originating during the same time,'" *Silver Lake*, 108 F.4th at 1089, lower courts have not focused on this plain meaning when considering what length of time is appropriate.

Some courts, without engaging directly in a textual analysis, have concluded that once plaintiff's trades are more than a day or so apart from the defendant's, it becomes difficult, and perhaps impossible, to credibly argue that the trades occurred or originated during the

same time. See, e.g., *Buban v. O'Brien*, 1994 WL 324093, at *3 (N.D. Cal. June 22, 1994) (concluding trades three days apart could not be contemporaneous).

But other courts have permitted a longer time gap — five days or even longer — stating that "contemporaneous" means a "reasonable period" or the period during which the defendant possessed undisclosed material information, without tying these conclusions to the definition of the word, "contemporaneous." See, e.g., *In re Oxford Health Plans*, 187 F.R.D 133, 144 (S.D.N.Y. 1999); *In re Am. Bus. Comps. Sec. Litig.*, 1994 WL 848690, at * (S.D.N.Y. Feb. 24, 1994).

Lower courts have also concluded that a 24-hour rule is consistent with the contemporaneous trading rule's purpose, along with the principles of Article III standing. The contemporaneous trading rule is designed to limit Section 20A claims to those plaintiffs who could have plausibly traded with the defendant and been harmed by trading at an unfair information disadvantage. See, e.g., *Brody v. Transitional Hosp. Corp.*, 280 F.3d 1005 (9th Cir. 2002).

Thus, while Section 20A does not impose a contractual privity requirement (which would be difficult or impossible to prove in many cases), it is meant as a "stand-in" for a privity. *Silver Lake*, 108 F.4th at 1190.

Courts have concluded that plaintiffs who make their trades more than about 24 hours after the defendant's trades are not part of the class of investors who could have plausibly traded with the defendant, and, therefore, fall outside of the circle of investors the statute was meant to protect. See, e.g., *In re Countrywide Fin. Corp. Sec. Litig.*, 588 F. Supp. 2d 1132, 1204-05 (C.D. Cal. 2008); *In re Fed. Nat'l Mortg. Ass'n Sec., Derivative, & "ERISA" Litig.*, 503 F. Supp. 2d 25, 47 (D.D.C. 2007); *In re MicroStrategy, Inc. Sec. Litig.*, 115 F. Supp. 2d 620, 663-64 (E.D. Va. 2000).

For similar reasons, lower courts have concluded that permitting plaintiffs who traded more than 24 hours or so after the defendant's trades to bring Section 20A claims might pose Article III standing problems. Plaintiffs bringing federal statutory claims must show that they were "concretely harmed by a defendant's statutory violation." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 427 (2021).

In insider trading cases, the plaintiff's alleged harm is that she traded at a material informational disadvantage to other investors. *Silver Lake*, 108 F.4th at 1189. That harm becomes less concrete and more speculative the farther away the plaintiff's trades are from the defendant's, because as the issuer's stock price changes in response to new information, it becomes harder to tell whether the plaintiff transacted at a price that was less favorable than the defendant. See *MicroStrategy*, 115 F. Supp. 2d at 663-64; *In re AST Research Sec. Litig.*, 887 F. Supp. 231 (C.D. Cal. 1995); *Buban*, 1994 WL 324093, at *3.

By restricting Section 20A claims to plaintiffs who purchased soon after the defendant, it is more likely that the plaintiff and the defendant transacted in the same trading environment, such that the plaintiff was actually harmed by the alleged information asymmetry.

While in Silver Lake the 9th Circuit did not articulate a bright-line rule for the timing of the contemporaneous trading rule, the court's definition of "contemporaneous" and its reinforcement of the characterization of the rule as a stand-in for privity, resonates with the emerging consensus that suggests a 24-hour limit.

Virginia Milstead is a regular contributing columnist on securities law and litigation for Reuters Legal News and Westlaw Today.

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Oct. 29, 2024, 2:00 AM PDT

TripAdvisor Relocation Appeal Tests Delaware's Dominant Status

By Jennifer Kay

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- Judge allowed TripAdvisor to move, investors to seek damages
 - Nevada says its differences with Delaware are exaggerated

Bloomberg Law News 2024-10-29T09:46:15850084149-04:00**TripAdvisor Relocation Appeal Tests Delaware's Dominant Status****By Jennifer Kay 2024-10-29T05:00:01000-04:00**

- Judge allowed TripAdvisor to move, investors to seek damages
- Nevada says its differences with Delaware are exaggerated

Amid heated debate in the corporate law community over whether Delaware is still the best home for much of the Fortune 500, no one seems to want the state's highest court to rewrite the rules dictating how and when a company can relocate.

The state's high court will hear an appeal challenging a Chancery Court opinion allowing TripAdvisor Inc. shareholders to pursue damages over the travel and booking website operator's planned reincorporation in Nevada, the latest in a series of rulings and statutory changes scrutinizing corporate control.

Incorporation is a "garden variety issue" for companies, and predictability in Delaware law is paramount even when they don't move there, said Jonathan Lazarow, a partner at corporate and IP boutique Ambrose Mills & Lazarow.

A physical headquarters, a principal shareholder's location, or the executives' preferred workplace is starting to matter more to some companies than a Delaware incorporation—so long as the state's corporate landscape follows Delaware laws, he said.

There have been a few notable “DExits,” as one corporate law professor calls them, including Elon Musk’s moving Tesla Inc. to Texas after the Chancery Court’s chief judge invalidated his \$56 billion CEO pay package. Advertising tech firm Trade Desk Inc.’s plan to relocate to Nevada now faces shareholder litigation.

“It’s less about what Colorado does—it’s about, do the justices and judges in Colorado look to what Delaware does so we get some predictability on shareholder rights and governance rights,” Lazarow said.

Why Nevada?

TripAdvisor and its controlling shareholder, Greg Maffei, say moving under Nevada’s stronger litigation protections for fiduciaries doesn’t constitute a material benefit requiring stricter judicial review, as the Chancery Court decided Feb. 20.

If the high court determines reincorporation in a jurisdiction less protective of shareholders doesn’t count as a conflicted transaction, that might allow controllers to undermine Delaware’s minority shareholder safeguards, said Ann Lipton, a Tulane Law professor. Her proclamation last year that “Nevada is where you incorporate if you want to do frauds” is cited by both sides in this week’s arguments.

The Delaware Supreme Court “doesn’t want to get into a fight with Nevada by saying merely leaving the state of Delaware is a conflicted transaction that requires close judicial review,” Lipton said. “But it also doesn’t want to make its own law toothless” if controllers can easily leave to avoid requirements they don’t like.

Affirming the lower court’s ruling would likely escalate the debate, she said. “If it says, ‘You’re right, this is a conflicted transaction,’ how do you determine if it’s entirely fair? Now you really do have to get into a question of which jurisdiction is better.”

University of Virginia law professor Michal Barzuza, whose research on Nevada corporate laws is extensively cited in the appeal briefs, said it would be helpful if the court clarifies the distinction between reincorporation to Nevada and reincorporation to other states. “Even Texas law is pretty similar to Delaware law,” she said. “Nevada is really an outlier.”

Guidelines Needed

The Delaware justices accepted a mid-case appeal in the lawsuit challenging TripAdvisor’s moving plans because it would be “beneficial” to have some guidelines as to the standard of review for such cases, per an April 16 order.

TripAdvisor argues the Chancery Court ruling applied the wrong standard and sets unrealistic expectations for board committees that evaluate reincorporation plans. The company had told shareholders that the reduced litigation risks in Nevada drove the relocation plan. Though Maffei has repeatedly faced claims in Delaware over allegedly conflicted transactions, there was no pending litigation when the board made the decision to move.

"If you were really smart, you might have said, 'We're going to Nevada because they have much lower franchise taxes,'" because that would benefit all shareholders and the company overall, said Robert Miller, a University of Iowa law professor.

"Elon and a few other controlling shareholders will see a benefit to them in being elsewhere and move out, but are you going to see any public companies without a controller moving over to Nevada or Texas?" he said. "I think that's inconceivable."

Nevada argues in a brief supporting TripAdvisor that its critics exaggerate the differences in policy decisions that "reflect each states' view of the benefits, costs, and burdens of litigation on its corporations." That's a fair argument, as there's not much data available supporting the idea that reincorporation seriously affects shareholder economic value, said Jill Fisch, a University of Pennsylvania business law professor.

"Even if Nevada law reduces shareholder litigation rights, that's not necessarily bad for the shareholders or for the corporation," she said. "Given the general debate about whether it's problematic for corporations to try to leave Delaware, I think that it's valuable for the Supreme Court to provide some guidance."

The case is *Maffei v. Palkon*, Del., No. 125,2024, oral argument scheduled 10/30/24 .

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Law Prof Calls Out Atty Fees, Workarounds In NAR Deal

 [law360.com/articles/2252950/print](https://www.law360.com/articles/2252950/print)

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Law360 (October 28, 2024, 7:16 PM EDT) -- A University at Buffalo Law School professor on Monday urged a federal judge to reject the National Association of Realtors' \$1 billion settlement in an antitrust class action, arguing the deal only serves to enrich lawyers in the case while allowing an anticompetitive system to continue.

Law professor Tanya Monestier objected to the settlement in *Sitzer v. NAR et al.* that came after a Missouri federal jury in October 2023 hit HomeServices, Keller Williams and the National Association of Realtors with a \$1.8 billion verdict after finding a century-old commission structure anticompetitive.

A law school professor has urged a federal judge to reject the National Association of Realtors' \$1 billion settlement in an antitrust class action, saying the deal will allow an anticompetitive system to continue. (Photo by Rafael Henrique/Sipa via AP Images)

The NAR agreed to pay \$1 billion and make a **series of policy changes** in a March deal that awaits a judge's final approval. Monestier on Monday, however, told Law360 the agreement still creates pressures for home-sellers to pay the broker fees of home-buyers — the same anticompetitive conduct the lawsuit sought to address.

Plaintiffs' lawyers are also wrongly seeking to be paid one-third of the total settlement — about \$330 million — even though the Eighth Circuit recently rejected fees of that rate for such large sums, Monestier argued.

"I feel like we haven't moved any further away from where we were when this lawsuit was filed, and so to me, that's just a complete wasted opportunity," Monestier said. "What the settlement was supposed to do was to make meaningful changes in real estate, and it hasn't done that."

The NAR in August rolled out a **series of policy changes in response to the litigation**, in a move purporting to end a system steering buyers to purchase homes with higher commissions and forcing sellers to pay a 6% commission to cover the broker fees of buyers. The U.S. Department of Justice is **separately conducting an antitrust investigation** into NAR's business practices after the D.C. Circuit in April allowed the probe to continue.

Monestier in her brief pointed to a series of other ways buyers can escape the bounds of the settlement, however.

In the past, buyers' brokers could count on getting 3% commission on a home sale from the seller. After the settlement, NAR affiliates would require buyers and their brokers to enter into agreements that establish how realtors can get paid.

Those agreements, however, can be modified later, Monestier argued, giving brokers a chance to pay themselves more while negotiating the home purchase. Monestier cites provisions from buyer-broker agreements circulated by a dozen state-level trade groups in her objection.

"If an extra 1% is on the table, why should that money go to the agent?" Monestier argued in the objection. "Practices like this where realtors scoop up 'excess' funds result in the maintenance of the commission structure that the NAR settlement was intended to dismantle."

Monestier points out other workarounds in her brief. In North Carolina, for instance, buyers' brokers can collect money in bonuses from sellers — even though the NAR settlement sets their compensation at what buyers agree to pay.

State associations in Texas and New Mexico also say buyers' brokers can collect bonuses from sellers, for instance. In Georgia, the state trade group specifies buyers' brokers can collect money each from the buyer, seller and seller's agent in rule that "most certainly" violates the NAR settlement, Monestier argued.

She added that one realtor told her the settlement terms could be avoided by accepting property-specific representation agreements that account for the commission a seller is offering. A buyer's broker can call a seller's broker to find out how much commission is available before drawing up the agreement and showing a house.

Monestier said Monday that such deviations from the settlement agreement create pressures for brokers to steer buyers to homes where sellers are offering higher commissions, perpetuating the practice at the heart of the antitrust settlement.

"The point is, if you're choosing to see or not see properties based on what compensation is being offered to your agent, that's a steering issue that pressures sellers into having to offer money to make sure that people aren't skipping their houses," she said.

In the objection, Monestier also argued fees sought by plaintiffs' attorneys in the case are far too high under an Eighth Circuit decision in August that overturned a trial judge's decision approving \$78.8 million in attorney fees on a \$350 million settlement following a T-Mobile data breach.

Monestier said Monday that some attorneys on the NAR case would be paid \$8,000 an hour for their work if the proposed fee structure is allowed to stand.

"The whole point of this class action was to decouple commission and to make it more procompetitive, and it has not done that at all," she said. "I think that's a hugely exorbitant fee for very not good results."

NAR declined to comment on Monday.

The case is Sitzler et al. v. National Association of Realtors et al., case number 19-cv-00332-SRB, in the U.S. District Court for the Western District of Missouri.

--Additional reporting by Matthew Perlman and Grace Dixon. Editing by Philip Shea.

Brazil institute sues social media giants for \$525 mln over usage by minors

 [reuters.com/technology/brazil-institute-sues-social-media-giants-525-million-over-excessive-use-by-2024-10-28](https://www.reuters.com/technology/brazil-institute-sues-social-media-giants-525-million-over-excessive-use-by-2024-10-28)

Ricardo Brito

The logo of Meta Platforms' business group is seen in Brussels, Belgium December 6, 2022. REUTERS/Yves Herman/File Photo Purchase Licensing Rights , opens new tab

BRASILIA, Oct 28 (Reuters) - Brazil's Collective Defense Institute, a consumer rights group, has filed two lawsuits demanding 3 billion reais (\$525.27 million) from the Brazilian units of TikTok, Kwai and Meta Platforms (META.O) , opens new tab for allegedly failing to create mechanisms to prevent indiscriminate use of these social media platforms by minors, according to initial petitions reviewed by Reuters.

WHY IT'S IMPORTANT

Social media regulation has become a hot topic in Latin America's largest country after a months-long feud between X owner Elon Musk and a Brazilian Supreme Court justice resulted in the company paying hefty fines.

DETAILS

The lawsuits demand the companies create clear data protection mechanisms and issue warnings about the risks to children's and teenagers' mental health due to platform addiction.

The lawsuits are based on a series of studies on the possible damage caused by unsupervised use of social media, especially by children and teenagers.

KEY QUOTE

"It is urgent that measures be adopted in order to change the way the algorithm works, the processing of data from users under 18, and the way in which teenagers aged 13 and over are supervised and their accounts created, in order to ensure a safer, healthier experience ... as is already the case in developed countries," said lawyer Lillian Salgado, one of the plaintiffs.

THE RESPONSE

Meta Platforms said in a statement that it wants "young people to have safe and age-appropriate experiences on our apps, and we have been working on these issues for over a decade, developing more than 50 tools, resources, and features to support teens and their

guardians."

The company, which owns Facebook, Instagram and WhatsApp, also said it had recently announced a new "Teen Account" on Instagram, which will arrive in Brazil soon and promises to automatically limit the accounts teenagers can see and who may contact them.

TikTok said it had not received any notice about the case, while Kwai, a social media site based around short videos, said in a statement that user safety is one of its priorities, specially when it comes to minors.

(\$1 = 5.7113 reais)

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Reporting by Ricardo Brito in Brasilia; Additional reporting by Patricia Vilas Boas in Sao Paulo; Editing by Matthew Lewis

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'Systemic and Pervasive'?: DiCello Levitt Alleges WWE Child Sexual Abuse Scandal



law.com/nationallawjournal/2024/10/28/systemic-and-pervasive-dicello-levitt-alleges-wwe-child-sexual-abuse-scandal

Sulaiman Abdur-Rahman

What You Need to Know

- Plaintiffs represented by DiCello Levitt and Murphy, Falcon & Murphy accuse the WWE of failing to prevent rampant sexual abuse of underaged boys.
- WWE co-founder Vince McMahon is represented by Akin Gump Strauss Hauer & Feld.
- Akin partner Jessica T. Rosenberg described the allegations as meritless.

DiCello Levitt and Murphy, Falcon & Murphy have filed a lawsuit accusing the founders of World Wrestling Entertainment of failing to prevent the systemic sexual abuse of underage boys.

Vince McMahon, Linda McMahon, WWE and TKO Group Holdings Inc. are named as defendants in the lawsuit filed in Maryland state court.

Five plaintiffs identified by the pseudonyms John Doe 1–5 say they have suffered "systemic and pervasive" abuse at the hands of former WWE ringside announcer Melvin Phillips Jr.

"Thanks to the bravery of our clients, we finally have a chance to hold accountable those who allowed and enabled the open, rampant sexual abuse of these young boys," DiCello Levitt partner Greg Gutzler said in a press statement. "That so many were aware of the sexual abuse of the Ring Boys and did nothing to prevent or stop it is simply unconscionable."

The complaint, filed Oct. 23 in Baltimore County Circuit Court, was surfaced by Law.com Radar.

According to the allegations in the complaint, the McMahons and WWE knew about the sexual abuse of underaged boys "but did not take any measures to prevent it."

Phillips committed the abuse in "plain sight of wrestlers and executives" in locker rooms and hotels during the 1980s and early 1990s, according to the allegations in the complaint. "Defendants allowed Phillips and others to engage in, and foster, the WWE's rampant culture of sexual abuse."

Phillips died in 2012 more than 30 years after the McMahons co-founded the sports entertainment business that would become WWE in 1980, according to The Associated Press.

New York Post reporter Phil Mushnick in 1992 wrote about the WWE's alleged "Ring Boy" scandal, according to the complaint. "Mushnick's article led to the empaneling of a grand jury."

The allegations in Mushnick's reporting are "false claims," according to Vince McMahon's counsel, Akin Gump Strauss Hauer & Feld partner Jessica T. Rosenberg.

"Those allegations were never proven and ultimately became the subject of a defamation lawsuit against Mr. Mushnick," Rosenberg said in a statement provided to the National Law Journal. "The negligence claims against Mr. McMahon that were asserted [Oct. 23] rely on these same absurd, defamatory and utterly meritless statements by Mr. Mushnick. We will vigorously defend Mr. McMahon and are confident the court will find that these claims are untrue and unfounded."

Counsel for the plaintiffs demand damages as determined by a jury trial in Maryland state court.

Vince McMahon resigned as TKO's executive chairman in January after former WWE employee Janel Grant filed a lawsuit accusing him and other co-defendants of sexual abuse.

Morgan, Lewis & Bockius and Paul, Weiss, Rifkind, Wharton & Garrison represent WWE in Grant's lawsuit filed in Connecticut federal court.

WWE is owned and operated by TKO. Neither responded to requests for comment on this article.

This action was surfaced by Law.com Radar, which delivers artificial intelligence-enhanced case summaries and daily case reports from more than 2,200 state and federal courts. Click here to get started and be among the first to act on opportunities in your region, practice area or client sector.

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Hershey's 'Bubble Yum' Contains PFAS, Consumer Alleges

 [law360.com/articles/2253124/print](https://www.law360.com/articles/2253124/print)

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By **Rae Ann Varona**

Law360 (October 28, 2024, 11:20 PM EDT) -- The existence of "forever chemicals" in The Hershey Co.'s Bubble Yum brand bubblegum undermines the multinational candy company's commitment to transparency about the ingredients in its products, a new proposed false advertising class action filed in California state court alleges.

Hershey's failed to disclose that its Bubble Yum gum contains "forever chemicals," a new proposed class action filed in California state court alleges. (Court documents)

Los Angeles, California resident Abraham Mohamed on Thursday accused Hershey's and the Bubble Yum brand of falsely, misleadingly and deceptively stating on their websites that they are committed to being transparent about the ingredients in their products and to meeting "highest quality, safety, and sustainability standards."

Mohamed said such statements couldn't be true when lab tests he commissioned revealed that both the Bubble Yum Original Flavor Bubble Gum's wrapper and gum contained organic fluorine — and indicator of per- and polyfluoroalkyl substance — at amounts exceeding manufacturing limits permitted under California law.

"Because [per- and polyfluoroalkyl substances] chemicals are 'forever chemicals' and accumulate in the human body and environment, there is no safe manner or level of exposure to humans," Mohamed asserted.

He said that the allegedly PFAS-laden gum was "particularly concerning given the fact that bubble gum is marketed to and consumed by children."

Mohamed's suit alleges false and misleading advertising in violation of the California Business and Professions Code, and violation of the California Consumers Legal Remedies Act. He seeks to represent a class of individuals who purchased the Bubble Yum gum in the Golden State in the last four years.

Mohamed says that the gum, which he purchased from various CVS and Walgreens stores in the last five years, contains organic fluorine, which he says puts consumers at risk of being exposed to perfluoroalkyl and poly-fluoroalkyl substances, which are often referred to as "forever chemicals."

He notes in his complaint that the California legislature has declared PFAS as being highly toxic. PFAS have also been linked, including by the California legislature and the U.S. Centers for Disease Control and Prevention, to serious health problems like breast and other cancers, hormone disruption, kidney and liver damage, and thyroid disease.

California Gov. Gavin Newsom in October 2021 signed Assembly Bills 652 and 1200 into law, banning PFAS in "juvenile products and food packaging," referring to products meant to be used by infants and children under 12 years old.

Mohamed says in his complaint that he commissioned independent third-party testing of the same gum and packaging he purchased and additional samples of the gum.

Results from a test done in February found that the wrapper contained 130 parts-per-million of organic fluorine, and 197 PPM organic fluorine in the gum, his complaint asserts.

A second round of testing done in early March came out with 122 PPM of organic fluorine in the wrapper, and 75.19 PPM in the gum.

"Both rounds of testing indicate dangerous levels of organic fluorine that implicate health and safety concerns...", Mohamed alleged.

"The existence of organic fluorine in the Products thus implicates health and safety concerns that a reasonable consumer would find material and therefore, Defendant has a duty to disclose the existence of organic fluorine in the Products and omitted facts it was obliged to disclose," he said.

He says that the gum's packaging and labeling should, at a minimum, provide a warning that it contains organic fluorine, a known indicator of PFAS, and that exposure may cause serious health effects.

Hershey's did not immediately respond to a request for comment late Monday.

Mohamed is represented by Paul D. Stevens of Stevens LC.

Counsel information for Hershey's was not immediately available.

The case is Abraham Mohamed, case number 24stcv27893, in the Superior Court of the State of California County of Los Angeles.

Live Nation must face consumer lawsuit over ticket prices, US appeals court rules

 [reuters.com/legal/litigation/live-nation-must-face-consumer-lawsuit-over-ticket-prices-us-appeals-court-rules-2024-10-28](https://www.reuters.com/legal/litigation/live-nation-must-face-consumer-lawsuit-over-ticket-prices-us-appeals-court-rules-2024-10-28)

Mike Scarcella

Live Nation Entertainment and Ticketmaster logos are seen in this illustration taken May 23, 2024. REUTERS/Dado Ruvic/Illustration Purchase Licensing Rights , opens new tab

Oct 28 (Reuters) - Live Nation Entertainment and its subsidiary Ticketmaster have failed to persuade a U.S. appeals court to block a proposed class action accusing them of charging artificially high ticket prices.

The San Francisco-based 9th U.S. Circuit Court of Appeals on Monday upheld , opens new tab a lower judge's 2023 ruling that said Live Nation could not enforce contract provisions that required ticket buyers to arbitrate their claims rather than sue in federal court.

The appeals panel said the arbitration rules were unfair to consumers and "overtly" beneficial to defendants. The rules, which placed the ticketholders' claims in the hands of a new arbitration body called New Era ADR, were "unconscionable and unenforceable," the court said.

Beverly Hills-based Live Nation did not immediately respond to a request for comment.

New Era chief executive Rich Lee in a statement said the company, which is not a defendant, was disappointed by the court's decision. Lee said New Era's rules are "objective, easy to understand, and, most importantly, highly advantageous for any party with meritorious claims or defenses."

The closely watched appeal tested the scope of companies' power to compel buyers to arbitrate their disputes, including through "mass" arbitrations involving hundreds or thousands of claims.

Warren Postman, a lawyer for the consumers, welcomed the decision in a statement. He criticized what he called "corporate attempts to impose novel group procedures to gain tactical advantages over consumers and employees."

The appeals panel found a key 2005 California Supreme Court opinion protecting class actions applied to the antitrust case against Live Nation and was not preempted by the Federal Arbitration Act.

New Era's arbitration rules were an "inadequate vehicle" for the plaintiffs to resolve their claims, the three-judge panel said, with rules "so dense, convoluted and internally contradictory to be borderline unintelligible."

Live Nation has defended New Era, calling its rules "sensible, fair, and similar" to those at other platforms.

In May, the U.S. Justice Department and a group of states asked a U.S. judge in Manhattan to break up Live Nation for allegedly violating antitrust law, claiming the company "suffocates its competition" in its control over ticket sales and pricing.

Live Nation in a statement then said there was more competition than ever before in the live events market.

The case is Skot Heckman et al v. Live Nation et al, 9th U.S. Circuit Court of Appeals, No. 23-55770.

For plaintiffs: Warren Postman and Albert Pak of Keller Postman; and Kevin Teruya and Adam Wolfson of Quinn Emanuel Urquhart & Sullivan

For defendants: Roman Martinez and Tim O'Mara of Latham & Watkins

Read more:

In Live Nation case, appeals court mulls mass arbitration breakthrough

Live Nation 'suffocates its competition,' US says in monopoly lawsuit

Live Nation in consumer ticket-price lawsuit loses bid for 'mass' arbitration

Reporting by Mike Scarcella

'Opaque and Unfair': 9th Circuit Rejects Live Nation's Rules for Mass Arbitrations

 [law.com/nationallawjournal/2024/10/28/opaque-and-unfair-9th-circuit-rejects-live-nations-rules-for-mass-arbitrations](https://www.law.com/nationallawjournal/2024/10/28/opaque-and-unfair-9th-circuit-rejects-live-nations-rules-for-mass-arbitrations)

Avalon Zoppo

The U.S. Court of Appeals for the Ninth Circuit on Monday called Live Nation Entertainment Inc.'s requirement of new procedures for mass arbitration claims unenforceable and rejected the company's bid to keep a proposed class action lawsuit alleging inflated ticket prices out of court.

The federal appellate panel said Live Nation's arbitration agreement requiring claims to go through provider New Era ADR Inc. is "unconscionable" under California law. New Era's newly created rules for dealing with mass arbitration claims gives the company a leg up over plaintiffs, the Ninth Circuit said.

"It is plain that it would be impossible for plaintiffs to present their claims on equal footing to Live Nation," Judge William Fletcher wrote for the Ninth Circuit. "Forced to accept Terms that can be changed without notice, a plaintiff then must arbitrate under New Era's opaque and unfair Rules."

Fletcher was joined in the opinion by Judge Morgan Christen. Lawrence VanDyke wrote a concurring opinion, stating his belief that the Federal Arbitration Act "does not apply to the type of mass 'arbitration' contemplated by Live Nation's agreements."

More broadly, the Ninth Circuit's decision marks a loss for companies trying to impose group arbitration procedures in response to the plaintiffs strategy of filing hundreds or thousands of similar arbitration claims against a company as a way to sidestep class action waivers.

Warren D. Postman of Keller Postman, who argued for the plaintiffs, said many companies have turned to mass arbitration rules similar to the ones created by Live Nation and New Era. The Ninth Circuit decision shows that workaround is likely to fail, Postman said.

"For example, one of the problems [that the Ninth Circuit identified] was that they tried to apply these new rules to claims that had already accrued," Postman said. "We see lots of companies trying to do that. And so that first section [of the decision] is helpful in that way."

In the underlying appeal, plaintiffs Skot Heckman, Luis Ponce, Jeanene Popp and Jacob Roberts brought a putative class action against Live Nation and Ticketmaster alleging anticompetitive practices. U.S. District Judge George H. Wu of the Central District of California denied Live Nation's motion to compel arbitration, finding that a "delegation clause" in the company's arbitration agreement was unconscionable.

The clause gives power to a New Era arbitrator to determine the validity of the arbitration agreement.

The Ninth Circuit, upholding Wu's ruling, said several features of New Era's procedures don't pass muster.

Under the rules, New Era batches five or more cases that have similar issues and facts and an arbitrator then resolves three "bellwether cases." The arbitrator's decision on whether he or she has authority to determine the validity of the arbitration agreement is binding on plaintiffs in all other non-bellwether cases even though they can't make their views heard at that point, the Ninth Circuit said.

"Indeed, plaintiffs in the non-bellwether cases will not even know the decision in the bellwether case as to the validity of the delegation clause until that decision is invoked against them," Fletcher wrote. "It is black-letter law that binding litigants to the rulings of cases in which they have no right to participate—let alone cases of which they have no knowledge—violates basic principles of due process."

The Ninth Circuit took issue with other restrictions set by New Era, including page limits for complaints and briefs and lack of right to discovery.

"New Era's restrictions on briefing border on the absurd," Fletcher wrote. "A bellwether plaintiff would have to work a miracle to successfully brief the merits of his or her claim, make any arbitrability arguments, and provide all evidence in only 10 documents totaling 250 pages, and with 15,000 characters of 'final arguments,'" Fletcher wrote.

The Ninth Circuit alternatively held that the Federal Arbitration Act doesn't protect the mass arbitration batching model set forth here.

Therefore, the panel said the case must comply with the California Supreme Court's 2005 decision in *Discover Bank v. Superior Court* that class action waivers in consumer contracts of adhesion are unconscionable and unenforceable under California law.

Postman said that aspect of the ruling broadly puts companies on notice that if they impose unfair procedures for mass arbitration claims, they risk a court throwing out the entire arbitration agreement.

"Although businesses are permitted to impose bilateral arbitration of the sort envisioned by the Federal Arbitration Act, corporate attempts to impose novel group procedures to gain tactical advantages over consumers and employees will strip those agreements of the protections of federal law and leave them vulnerable to unconscionability challenges under state law," Postman said.

Latham & Watkin's Roman Martinez, who argued for Live Nation, did not immediately return a request for comment Monday.

The Ninth Circuit rendered its decision in *Skot Hekman et al. v. Live Nation Entertainment Inc.*, No. 23-55770.

Why Short Sellers Just Can't Get Along: Marc Rubinstein

By Marc Rubinstein

Opinion

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Why Short Sellers Just Can't Get Along: Marc Rubinstein

By Marc Rubinstein 2024-10-29T01:00:21482-04:00

In the final episode of the HBO series *Industry*, young portfolio manager Harper Stern announces she wants to launch a short-only fund. “We’ll knuckle down on companies who might be misleading the market, committing fraud or engaging in unethical business practices,” she pitches. “We will find the liars, we will find vulnerabilities – and therefore what is mispriced – using a combination of forensic accounting and corporate espionage.”

Her prospective backer replies sarcastically: “You’ll be popular.”

It’s true, short sellers aren’t exactly well liked. In South Korea, they’ve been *personae non gratae* since November 2023 when financial authorities imposed a ban on the practice after uncovering illicit trading by foreign firms. This month, they indicted BNP Paribas SA for allegedly violating short-selling rules, according to a Bloomberg report, adding to a list of firms being investigated. (BNP Paribas declined to comment to a Bloomberg News reporter).

It comes several months after US authorities filed civil and criminal charges against Andrew Left of Citron Research for publishing false and misleading statements regarding his short-selling recommendations. (He has pleaded not guilty.) The Securities and Exchange Commission’s contempt for Left is evident in its complaint: His language is “larded with hyped rhetoric”; he bragged to colleagues that he could “destroy” or “kill” companies; he acted “recklessly.”

While the charges relate less to the act of short selling than the tactics he employed, the aggressive nature of many short sellers puts a target on their back. “Until we get to a point where a lot of people lose lots of money and see the risks as real, we are going to be decidedly unpopular,” fellow short seller Carson Block told the New York Times.

But it's not just their betting against rising prices that makes them unpopular. In an industry that values trust (the root of "credit" is the Latin word for "believe," after all), short sellers go against the grain. They view everything, and everyone, with suspicion. This can render them oddballs and outcasts. Fraser Perring, one of the short sellers involved in identifying Wirecard AG as a fraud, describes himself as "an individual that sees the world differently." Carson Block says that he enjoys "f*cking with people." Fahmi Quadir, who featured in the Netflix documentary *Dirty Money* discussing her short on Valeant Pharmaceuticals, reckons "all short sellers are outsiders."

Although not a professional short seller, Harry Markopolos, the investigator who spotted Bernard Madoff as a fraud, shares many of the same traits. "To him, dishonesty and stupidity are everywhere," Malcolm Gladwell says about him in his book, *Talking to Strangers*. "If everyone on Wall Street behaved like Harry Markopolos," he continues, "there would be no fraud on Wall Street — but the air would be so thick with suspicion and paranoia that there would also be no Wall Street."

Such simmering suspicion makes short sellers untrusting even of each other. John Hempton of Australian hedge fund Bronte Capital Management writes that having met Andrew Left a couple of times, he "decided to avoid him thereafter." Roddy Boyd, an investigative journalist who received funding from short sellers, called Fraser Perring "a charlatan of the first order." Fights have subsequently broken out between Boyd and other short sellers.

Now, tempers are fraying between two rising stars in the short-selling community. In mid-October, Edwin Dorsey, author of the Bear Cave newsletter, accused Nate Anderson of Hindenburg Research of not properly acknowledging his work. "I know Nate Anderson, I've had dinner with him," he begins. Yet, it seems that short sellers can never really get on. Anderson responded on Twitter/X refuting the allegations before Dorsey followed up with a post alleging a conspiracy — which Anderson called baseless — between Hindenburg and the Wall Street Journal.

Part of the argument rests on how short sellers get paid. Many, including Hindenburg, deploy their own capital often alongside silent partners. Edwin Dorsey doesn't bet against the companies he highlights, making money instead from subscriptions to his newsletter.

The crux of the issue, though, is that short sellers are no more likely to trust each other than they are corporate executives. Nate Anderson recognizes this isn't ideal. "This is a small industry which already faces plenty of controversy by virtue of the fact that we are basically picking fights with white collar criminals for a living," he pleads with Dorsey.

Short sellers complain that nobody likes them, but when it comes to popularity, they hardly help themselves.

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(Adds a comment by Anderson in ninth paragraph.)

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Matt Levine's Money Stuff: You Want Some Stocks That Go Down

By Matt Levine

Opinion

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Matt Levine's Money Stuff: You Want Some Stocks That Go Down

By Matt Levine 2024-10-28T14:24:59264-04:00

Tax long/short

One useful intuition of modern finance is that stocks are all kind of the same. Oh they're not, they're not, this isn't true. But lots of stocks are interchangeable to some degree, particularly if you own a lot of them. A fair amount of the returns of many stock portfolios are determined by the returns to the overall market, to industry sectors, and to other well-known factors like value and size. You could construct a diversified portfolio of 100 stocks that is reasonably well correlated with the S&P 500 Index, and then you could construct a diversified portfolio of 100 entirely different stocks that is also reasonably well correlated with the S&P 500.

This is useful in various ways for investing: You can target the broad market return, or you can pick sectors or styles rather than individual stocks. Or you can go the other way, get really good at picking individual stocks, and then hedge out your exposure to the risks that are common to all the stocks.

But it's also useful for taxes. The basic rule in the US is that if you buy a stock and it goes up, you pay capital gains taxes when you *sell* it. If you buy a stock and it goes down, you can deduct your losses on the stock when you sell it. If you don't sell, there's no tax impact. (Conversely, if you sell a stock short and it goes up, you have a loss when you buy it back; if you sell it short and it goes down, you have a gain when you buy it back.)

So if you buy 130 stocks and sell short 30 stocks, and then wait a while, you will probably end up making money on, I don't know, 120 of your trades and losing money on 40 of them. (Stocks mostly go up.) The ones you made money on, you keep. The ones you lost money on, you get out of: You sell the stocks you owned and buy back the ones you shorted. The ones that you keep, you don't pay taxes on. The ones that you get out of trigger tax losses. If you have other capital gains — if you sold a house or a business or whatever — then you can offset these losses against those gains and avoid paying taxes. And then you go put on 40 more trades to keep everything in balance, so you can do this again. You have regular tax losses but no gains.

There are, sort of, tax rules against this sort of thing, “wash sale” rules and “straddle” rules. The ideas here are:

1. If you buy Stock X, it goes down, you sell it to realize a capital loss, and then you immediately buy it back, you shouldn't get to deduct that loss, because you didn't *really* sell the stock.
- 2. If you buy Stock X in one account and short Stock X in another account (or do equivalent things with options, etc.), and then Stock X goes up, you will have a gain in one account and a loss in the other. If you close out the losing account and keep the winning one, you shouldn't be able to deduct the losses, because they aren't *really* losses.

And those rules might cover every case in a world in which every stock was completely uncorrelated with every other stock. But in our world, “if Stock X goes down, sell it and buy Stock Y” is a pretty good substitute for a wash sale, and “go long Stock X and short Stock Y” is a pretty good substitute for a straddle. Or really “Diversified Portfolio X” and “Diversified Portfolio Y.” For the purposes of generating tax losses, one pile of market exposure is about as good as another.

That is probably too glib but not by much. Bloomberg's Justina Lee reports:

Tax-loss harvesting is the strategy of selling losing investments to offset the tax owed on gains realized elsewhere in a portfolio. It's a powerful tool deployed often in equity holdings, but it has a key limitation: An investor doesn't always have losses to harvest. That can be especially true in a US stock market that keeps notching new records after tripling over the past decade.

That's where a “tax-aware long-short” strategy comes in. The totally legal approach is a mashup of hedge fund and personalized portfolio which uses leverage in an individual investment account to bet on some stocks and against others. The goal overall is to make money, but the method practically guarantees there will also be losses to harvest from some of the hundreds of positions. ...

With this portfolio, typically 130% long and 30% short, an investor is more likely to have losing positions and more likely to accrue them quickly.

Just like in simpler versions of tax-loss harvesting, those losses can be realized by selling positions. Cash from the sales is reinvested in economically similar securities (to maintain the balance of the portfolio), while the losses are booked and used to offset capital gains elsewhere.

And:

Tax long-shorts are more expensive than other approaches, complicated and only really effective for those with significant capital gains. But for investors in the right circumstances they're "wonderful," says John West, co-founder of Flatrock Wealth Partners at Newport Beach, California.

"You need to have unrealized capital gains somewhere in your capital stack, generally outside of your diversified investment portfolio," says the former partner at quant shop Research Affiliates, who has been offering these strategies to clients for a little more than a year. He reckons it works best "if you have a private business you might sell. You have a bunch of low-basis stock and you might sell. You're a 50-something who wants to downsize your Newport Beach home."

Obviously it's better to buy mostly stocks that go up and short mostly stocks that go down, but if you do enough trades you'll have a little of everything, and the bad ones are good for taxes.

Quant credit

Intuitively, "bonds are all kind of the same" has to be even more true than "stocks are all kind of the same." Some stocks are Nvidia; many others are not. But a bond is like "you put in \$100 and you get paid \$X per year for Y years and your \$100 back at the end." X and Y will vary a bit, but they are known in advance. Your upside is finite and known; your downside is limited. Some bonds are riskier than others — some bonds are issued by safe companies with lots of money and will definitely pay you as promised, while others are issued by unstable companies that might not — but even those risks are pretty standardized with well-known public credit ratings. "One BBB+ bond is as good as another BBB+ bond so just buy whatever BBB+ bond you see first" is not a *good* investing strategy, and there are a lot of credit investors who get paid a lot of money *not* to do that, but isn't it *kind* of plausible? Doesn't it sound about as right as "stocks are largely linear combinations of factor exposures"?

Historically, though, for a long time there was a view that each bond is a special snowflake and you had to travel to the ends of the earth to get *exactly* the BBB+ bond that you were looking for. "People were worried about bond market liquidity," in part because there were so many bonds and how could you ever meet anyone who was looking to sell exactly the same special bond that you were looking to buy? The modern view is that bonds are largely linear combinations of factor exposures so liquidity is just fine. Here's Bloomberg's Caleb Mutua on quant credit managers:

Systematic money managers, making fast decisions about corporate bonds to buy and sell using complicated algorithms, have seen their assets more than double over the last year by one measure, according to Barclays Plc strategists. By another metric, there could be \$90 billion to \$140 billion of funds in these strategies in US high-grade and junk bond markets.

It's the latest sign of how bonds are trading with growing frequency in credit markets, thanks in part to exchange traded funds. That higher liquidity is allowing innovations that have fueled stock trading for decades, including black-box trading models, to gain more of a foothold in company debt markets as well, according to Barclays.

"The number of funds and the total deployed assets associated with systematic strategies have ballooned recently," Barclays strategists Andrew Johnson and Dominique Touban wrote in a note to clients on Friday. "Up until the past few years, systematic strategies occupied a relatively small corner of the credit market. This has been changing rapidly, and the effects on liquidity and price action are already apparent."

The shift is pitting investors with technical PhDs against traditional portfolio managers that have business degrees. Systematic investors use computer models to scan entire markets and select securities that fit their strategies. ... Because systematic firms look far and wide for investments, they will probably find opportunities others miss, thereby providing liquidity in obscure corners of the market.

There is something beautiful about this: Bond market liquidity was bad because bond investors with MBAs used to be like "well I can only buy the bonds that I know personally," but now it is fine because bond investors with physics Ph.D.s are like "a bond is just a yield and a credit and I can plug them all into my calculator and buy whatever has a high yield with a good credit, so if you want to sell a weird bond I'll buy it."

Reverse splits

Here's a pretty well-known trade that can generate returns of 1,000% or more in a week:

1. Every so often there are teeny little public companies that are listed on Nasdaq or the New York Stock Exchange, but that have fallen into penny-stock territory. The stock exchanges generally require a company to have a stock price of at least \$1 to remain listed, and these companies' stocks have fallen well below \$1. So they are in imminent danger of being delisted, which they don't want.
- 2. There is, however, a fairly straightforward solution: The company can do a reverse stock split, where every, say, 5 or 10 or 20 shares turn into a single new share. Let's say the number is 20: If you owned 100 shares before the reverse split, you own 5 shares afterwards. Dividing the company into fewer shares should make the price of each share higher: If the stock was at \$0.40 before, after the 1-for-20 reverse split it should be at about \$8. (Not much science on that: These stocks are pretty volatile, so after the split it might be at \$4 or \$12, but it should be *some* multiple of the pre-split price because each share now represents 20 times as much of the company.)
- 3. But what if you owned, not 100 shares, but *one* share before the split? Do you own 0.05 shares afterwards? Fractional shares have become much more accepted as a matter of brokerage accounting, and it's possible to own 0.05 shares of some stocks in your brokerage account. But most companies' official shareholder registries do not have fractional shares: If you are an official holder of record of stock, you have to own some whole number of shares.
- 4. So it's a fairly common convention, in these situations, to round up fractional shares: If you have 19 or 11 or one share before the 1-for-20 split, you get one whole share after.
- 5. Thus the trade: You buy one share for \$0.40 just before the record date for the split, and then you are given one whole share after the split, which should be worth \$8, give or take. That's a return of \$7.60 on your \$0.40 investment, or about 1,900%, for maybe a week of exposure.

Nothing here is investment advice, and I cannot guarantee that this will work out for you as advertised, but it is a popular strategy and you can find websites and Reddit posts about it. I trust you see the main problem with it, though, which is that it doesn't scale particularly well. The trade is buying one share of stock for less than \$1 and then getting back five or 10 or 20 times as much stock, for a return of five or 10 or 20 times your investment. But "one share" and "less than \$1" are critical parts of the trade. In my example you make \$7.60. If you try to do this trade 1,000 times to get \$7,600, it doesn't work: Buying one share gets you \$7.60 of free money, but buying 1,000 shares gets you a nice even multiple of 20 shares and no free money at all. Opening 1,000 separate brokerage accounts to do this 1,000 times ... look, I'm sure someone has done it, and probably described it in loving detail on Reddit, but it seems tedious.

I guess you could just have a brokerage account, keep like five dollars in it, set up an alert for every reverse split, buy one share of each of them, and make, I mean, probably a number of dollars per month that is greater than \$1 but less than \$20? For a fair amount of effort? But perhaps a very *satisfying* \$20 a month, \$20 a month found in some of the mustiest couch cushions of modern financial capitalism.

In the limit you can imagine teeny penny-stock companies going into their reverse splits with some normal-ish penny-stock list of shareholders (insiders, retail, etc.), and coming out of the splits with a new shareholder base consisting mostly of thousands of retail reverse-split arbitrageurs, each of whom owns exactly one share. I would love to be the chief executive officer of a tiny company whose shareholders are exclusively reverse-split arbitrageurs; I feel like they know how to have fun. I guess they'd all sell the shares immediately though, never mind.

Anyway Upexi Inc. is a teeny Nasdaq-listed company that is in various sorts of listing trouble with Nasdaq and did a reverse split to address some of them. Here is a funny press release from Upexi on Friday:

Prior to the Company's required announcement regarding the reverse stock split on September 27, 2024, Upexi estimates there were less than 5,000 shareholders of record. Post-split 5 Brokerage firms have requested roundup shares equaling approximately 199,059 shares of the Company's common stock out of a total of 202,183 round up shares of the Company's common stock requested.

The 202,183 roundup shares requested is approximately 19% of the Company's outstanding shares of common stock post-split and represents an increase of approximately 40 times the number of individual shareholders owning the Company's common stock. The foregoing activity appears to have occurred during the 3 day trading period between the reverse split announcement and the effective date of the reverse split.

The Company and its legal team are currently reviewing the foregoing trading activity to determine if such activity involved possible stock manipulation.

Allan Marshall, the Company's Chief Executive Officer, stated, "The Company intends to pursue this issue to the fullest extent necessary to protect the Company's shareholders exposed to the issue and to help other listed companies to avoid this issue going forward."

Obviously if they find one guy who set up 200,000 brokerage accounts to buy 200,000 pre-split Upexi shares (for something in the neighborhood of \$40,000) and turn them into 200,000 post-split Upexi shares (worth \$1.6 million as of Friday's close) then I will be impressed. We talked last month about a guy who found a way to make a few bucks a month via a Spotify arbitrage, and then scaled it up by having bots open thousands of Spotify accounts; this would be the brokerage version of that. But it's also possible that it's mostly individual retail traders doing this to make a couple of bucks.

I kind of feel like that is a fair, though arbitrary, punishment for falling into penny-stock territory. *Formally*, having a stock price below \$1 will get a company delisted; *practically*, companies can often avoid that fate with a reverse split. (This is controversial and in fact the exchanges have proposed rules to limit the number of reverse splits companies can do to stay listed.) But the reverse split comes with its own weird punishment: You have to pay away 19% of your stock to retail reverse-split arbs as a tax on being a penny stock.

Concentration

"Stocks are all kind of the same" is a pretty useful approximation but it has broken down recently due to big tech. The Financial Times reports:

Just five large companies — Nvidia, Apple, Meta, Microsoft and Amazon — have contributed about 46 per cent of the year-to-date gains for the S&P 500.

"It's a very difficult situation for active managers," said Jim Tierney, chief investment officer for concentrated US growth at AllianceBernstein. "Normally having a position at 6 or 7 per cent of your portfolio is as far as most portfolio managers would want to push it for a business you have real conviction in. The fact that would now be a neutral weight or even underweight, it's an unprecedented situation."

At the end of September, Fidelity's \$67bn Blue Chip Growth fund, which is benchmarked against the Russell 1000 Growth index, had more than 52 per cent of its portfolio in large positions — Nvidia, Apple, Amazon, Microsoft, Alphabet and Meta. BlackRock's recently launched Long-Term US Equity ETF also had 52 per cent of its assets in holdings worth more than 5 per cent of the portfolio as of last week, according to data from Morningstar.

That's from a story about US tax concentration rules, which penalize mutual funds whose portfolios are mostly (50% or more) made up of concentrated positions (stocks each representing more than 5% of the portfolio). In the olden days you'd buy 50 stocks and they'd each be around 2% of the portfolio and it was fine; for stocks you really loved you'd maybe stretch to 6% or 7%. These days, *the market* mostly loves those big tech names, so just a neutral weighting — just "I think Nvidia is fairly priced" — would give you a ton of Nvidia. And those big names are where all the growth is, so omitting them is painful.

Tether

One model of Tether and its stablecoin, USDT, is something like “Tether is like a bank with no capital requirements, minimal regulatory oversight, a history of doing weird stuff, and it doesn’t pay interest.” This model seems bad. I mean, good for Tether, but what is the appeal of this? Why would it be a thing?

Another model of Tether is something like “cryptocurrency trading is a fun casino game and USDTs are the chips you use in the casino.” This model is fine, but not that inspiring. If you are betting on crypto it is helpful to believe that crypto solves some real-world problem. These days when people talk about real-world use cases for crypto, they tend to start with stablecoins (like USDT) as a tool for payments. “USDT is a necessary tool for speculating on useful crypto projects” *could* be a good story, but if the main useful crypto project is Tether then that doesn’t work.

A third model is something like “Tether is a way to send US dollars that is faster, more technologically sophisticated and more convenient than using the regular US banking system.” This model is the most straightforward real-world bull case.

But a fourth model is something like “Tether is a US dollar-denominated alternative to the US dollar financial system: It works a lot like dollars, except that, unlike the rest of the dollar system, it is not subject to the whims of the US government.” This model seems ... interesting. This model, I think, describes a niche that could provide a lot of value, and that a lot of people want. We have talked recently about the demand (among Russia and other not-aligned-with-the-US countries) for an alternate payment system, and about Tether’s pitch to commodity trading firms as a way to finance global trade. I wrote that one “possible bet is ‘if the US government keeps weaponizing the dollar, someone will invent a better dollar, something that is fully interchangeable with the dollar but that is not subject to US government policy.’ What if it’s Tether?”

Obviously the problem with this model is that the US government *likes* having the dollar financial system subject to its whims. Also, like, I say “whims,” but some of the whims include “not financing terrorism”; you might like the whims. Anyway the Wall Street Journal reports:

The federal government is investigating cryptocurrency company Tether for possible violations of sanctions and anti-money-laundering rules, according to people familiar with the matter.

The criminal investigation, run by prosecutors at the Manhattan U.S. attorney’s office, is looking at whether the cryptocurrency has been used by third parties to fund illegal activities such as the drug trade, terrorism and hacking—or launder the proceeds generated by them.

The Treasury Department, meanwhile, has been considering sanctioning Tether because of its cryptocurrency’s widespread use by individuals and groups sanctioned by the U.S., including the terrorist group Hamas and Russian arms dealers. Sanctions against Tether would generally prohibit Americans from doing business with the company. ...

Tether is the world's most traded cryptocurrency, with as much as \$190 billion changing hands each day. It is also a vital financing tool for several of the U.S.'s top national-security concerns. These include the North Korean nuclear-weapons program, Mexican drug cartels, Russian arms companies, Middle Eastern terrorist groups and Chinese manufacturers of chemicals used to make fentanyl, The Wall Street Journal has previously reported. ...

Tether said it had no indication the company is facing a broader investigation. "To suggest that Tether is somehow involved in aiding criminal actors or sidestepping sanctions is outrageous," the company said. "We work actively with U.S. and international law enforcement to combat illicit activity, as we've publicly demonstrated many times."

It is a fine line; "we are a way to send dollars without quite as much interference from the US government" is a good pitch, but not if the US government hears it.

Things happen

Boeing Launches \$19 Billion Share Sale to Thwart Downgrade. Elliott Hunts Bigger Prey, Testing Limits in Barrage of Activism. NYSE plans to extend daily trading to 22 hours on its Arca exchange. Average Pay Rises to \$1.4 Million for Private Markets Pros. Delta Sues CrowdStrike Over July Operations Meltdown. Catastrophe-Bond Funds Suffered Virtually No Losses From Hurricane Milton. Bangladesh central banker accuses tycoons of 'robbing banks' of \$17bn with spy agency help. The Wallenbergs start succession to sixth generation. From intern to CEO: does it pay to be a company lifer? Douglas Elliman Board Pushed for CEO Howard Lorber's Exit Amid Culture Concerns. Olympus chief executive forced to quit over alleged illegal drug purchase. Brooklyn Jail Housing Diddy, SBF Is Raided by Federal Agencies. Google Is Developing AI to Take Over Computers. Robot cellist.

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- 1. Sometimes companies pay cash in lieu of fractional shares, but you can see why teeny troubled penny-stock companies might want to preserve cash.

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Matt Levine's Money Stuff: ETFs Are Where the Fun Is

By Matt Levine 2024-10-29T14:03:36138-04:00

n-stock ETFs

If you are a retail stockbroker, sometimes your customers will come to you looking to do a trade. “I want to buy this Nvidia,” they say, or “this Bitcoin,” or “I want to buy the S&P 500 index and also write monthly out-of-the-money calls on it for income.” And if their idea is basically sensible you will try to help them do the trade they want to do. Sometimes this means just buying a stock for them; other times it might mean lending them money to buy it on margin, or lending them stock to short, or writing them derivatives or structured notes to get exactly the payoff profile they want.

And then other times *you* will go to the customers with ideas, saying “hey you should really buy this Nvidia” or “diversify into some Bitcoin” or “consider writing covered calls on your S&P portfolio.” You will do this for the obvious combination of reasons:

- 1. You will make money by executing these trades for them, particularly if they involve weird derivatives.
- 2. You think (reasonably or not) that these trades will be good for them, and you want what is best for them.
- 3. You want to *provide customer service*; you want to *do stuff*; you want them to feel like you are paying attention and coming to them with ideas. This is not quite the same thing as Point 2. You will be somewhat tempted to come to your customers to propose *popular* ideas, or *cool-sounding* ideas, ideas that impress them and make them think you are clever. That will make them respect you more and invest more money with you, even if the ideas turn out to be bad. “Just put it in index funds” might be good advice, but they can get that anywhere; they want some pizzazz from you.

These things interact: The more customers come to you saying “I want to write covered calls for income,” the more you will be tempted to go to the *other* customers and say “hey writing covered calls for income is very popular right now, you should do that.”

I am describing all this stuff that a retail stockbroker might do, but somewhat hypothetically. A lot of people do still talk to their brokers on the phone, calling for ideas and stock tips. A lot of people use apps, though. A lot of people are self-directed investors, just buying and selling stocks by pushing buttons on their phones without ever talking to a human broker who could execute their more complicated ideas or suggest new ones.

Fortunately there are exchange-traded funds. The way I think about the ETF industry is that it is the modern source of pizzazz in retail investing. There are lots of trades that retail investors want to do, and/or that someone wants to market to them, and ETFs exist to package those trades into convenient formats. This can be helpful for brokers and advisers: Instead of coming to customers and saying "here's a trade you can do," explaining the trade in detail, and then working hard to execute the various legs of it, the brokers can go to customers and say "here's a trade you can do in ETF format," point the customers to the ETF's disclosures to explain it, and then just buy the ETF to execute the trade. Everything is efficient and neatly packaged, so the brokers don't have to do their own work in explaining and pricing and executing the trade.

And it's even more convenient for self-directed investors: Instead of having to go to a stockbroker to put on some weird derivatives trade, you can buy it yourself, in ETF form, by pushing a button on your phone. The fun pizzazz trades that people want from their brokers, and that brokers pitch to their customers, get turned into ETFs so that anyone can buy them directly.

So [here's this](#):

Tidal Investments plans to offer a family of actively managed exchange traded funds that take leveraged long positions in pioneering and innovative companies and pair those with short positions in their legacy counterparts, a regulatory filing shows.

The new Battleshares family of strategies comprises eight ETFs across the entertainment, finance, news and technology sectors, according to the filing. The Battleshares NVDA vs INTC ETF, for example, will take a leveraged long position in Nvidia and a short position in Intel. ...

Each ETF will target a leveraged long position of 180 to 220 per cent in the pioneer company and a negative 80 to negative 120 per cent in the counterpart legacy leader, according to the filing.

Vildana Hajric wrote about these ETFs last week in the Bloomberg ETF Brief newsletter, noting that they are a new category: Classically ETFs represent diversified portfolios (index-y, thematic, actively

managed, whatever) of stocks, and more recently there have been lots of single-stock ETFs, but these would appear to be the first *two*-stock ETFs. Hajric:

They're not exactly single-stock ETFs, given that they'd each focus on two different companies. So what do we call them? ...

Ben Johnson, head of client solutions at Morningstar, had a more NSFW suggestion: We could call them WT(ET)F ETFs.

"Less provocatively, you might call them DIFM ('Do it For Me') single-ticker trade ETFs," he said. "A lot of them replicate common trades and/or options overlays without all the complexity of a DIY ('Do it Yourself') approach." ...

While all of these were decent suggestions, my quest for a new category name was a ploy because all along, I had already planned to pick a moniker Katie Greifeld and I came up with as the winner: double-single-stock ETFs.

Far be it from me to question Hajric or (my podcast cohost) Katie Greifeld, but I like the "Do It For Me" description. This is a way to take a moderately complicated trade — invest \$100, take out a margin loan to buy \$200 of Nvidia, also short \$100 of Intel and rebalance periodically as prices change — and turn it into a single button to push on your phone. If you were going around looking to do that trade, this is a pretty convenient way to do it. And while you are paying for that convenience, it's not clear that you're paying *much*: Tidal might have cheaper leverage and lower trading costs than you do in your retail brokerage account, so it might be cheaper for you to do the trade through the ETF.

But Tidal is not only making it easier for you to execute this idea; it's also *suggesting* this idea to you. It's *marketing* it. You can read about it and think "ah yes, Nvidia *is* in the news in good ways recently, and Intel is in the news in bad ways, and I should get do something about that." And Tidal has something for you to do about it.

I love this? It is just such a life-finds-a-way sort of story. Any sort of trade can be packaged into an ETF, as long as you can write a cool elevator pitch for it, and eventually every trade will be.

Jack Bogle [famously hated ETFs](#), for reasons that used to strike me as bad, but you can see why he'd hate *this*. You could tell a story of investing that is like:

- 1. People used to think about what stocks to buy, get advice from brokers, and then buy some stocks rather than others hoping to make money. This could be hard and intimidating, but it was pretty fun if you were into it, and sometimes the results were exciting.
- 2. Financial theory discovered that actually most ordinary investors' best bet is to just buy all the stocks in a diversified market portfolio and not think about it at all.
- 3. The financial industry built the index fund, to give retail investors low-cost access to that theoretically approved portfolio.
- 4. Then the financial industry built the index ETF, as a cleverer and more tax-efficient way to do index funds.
- 5. The investing problem for retail investors was in some rough sense *solved*. You can just buy a handful of big index funds — or maybe one life-cycle fund that buys index funds — and hold them until you retire. Simple tools (self-directed brokerage accounts, robo-advisers) exist to make that easy. The whole problem of thinking about your investments, learning how they worked, trying to choose good ones, getting excited if they went up, etc., seemed like it could be automated away.
- 6. Apparently people got bored?
- 7. It turned out that you could put all sorts of exciting fun trades into ETFs.
- 8. And now “I think Nvidia is going to eat Intel’s lunch” is a thesis that exists in an ETF package.

Wash sales

We talked yesterday about a way to harvest tax losses. You have a diversified portfolio of securities. Some of them have gone down. You would like to deduct your losses on your tax return, to offset taxable gains elsewhere. In order to deduct them, you have to “realize” the losses, by selling the stocks that have gone down. That is risky, though: You have this diversified portfolio, and it will be out of balance if you just sell all the losers.

What you want to do is sell all the losers, realize the losses, and then *buy them back*, so that you remain fully invested. But you can't do that: The tax rules say that you can't deduct your losses on a stock if you do a “[wash sale](#),” meaning selling it and then buying it right back.

What I said yesterday is that this problem is easily solvable because, to a rough approximation, “stocks are all kind of the same.” A diversified portfolio of stocks can be described reasonably well by its exposure to some list of factors (the market, industries, size, value, etc.), and you can find some other portfolio of different stocks with similar exposures to those factors. So if you have 30 stocks that

went down, you sell those and buy 30 different stocks that are reasonably similar. It's not a wash sale, because you bought back different stocks, but it's good enough, because the stocks you bought are decent substitutes for the ones you sold. This is not tax, legal or investing advice.

Meanwhile if instead you own exchange-traded funds, and one of them goes down, you can pretty easily sell that, deduct the losses and buy a different ETF with ... the same stocks? Similar stocks? A broadly overlapping set of stocks that serves exactly the same purpose in your portfolio? I don't know, here we are even farther from tax advice, and I would not necessarily want you to try this at home, but a reader did point me to [this paper from July](#):

Tax wash sale rules prohibit investors from recognizing capital losses when they sell and immediately repurchase substantially identical securities within short windows. This study examines whether institutional investors use ETFs to circumvent the wash sale rule. We find incumbent ETFs experience more trading volume upon the introduction of nearly identical ETFs, particularly when recent returns are negative. Tax-sensitive institutions' investment in highly correlated ETFs has proliferated in recent years, exceeding a quarter of AUM. Further, we find that tax-sensitive institutions holding more ETFs are significantly more likely to engage in swapping near-identical ETFs. This swapping behavior has become widespread, with tax-sensitive institutional investors swapping \$417 billion of near-identical ETFs since 2001. Overall, we estimate that a one standard deviation increase in ETF swapping results in an incremental \$138 billion of aggregate losses harvested for tax-sensitive institutional investors.

That's "ETFs and the Wash Sale Loophole," by Michael Dambr, Andrew Glover, Charles M.C. Lee and Phillip J. Quinn. We talked last year about a [ProPublica investigation](#) into tax-loss harvesting that wealth managers do for wealthy investors. ProPublica reported on some cases of investors selling ETFs for losses and then buying different ETFs with similar exposures, and noted:

In theory, the stocks inside two different funds could overlap so much that the IRS might deem them "substantially identical" and thus disallow any tax loss on such a trade.

In practice, however, there is only one scenario in which the wash sale rule is consistently enforced. IRS regulations require brokerages to mark a trade as a wash sale if, in the 60-day period around the sale, the investor buys, in the exact same account, the exact same security (with the same ID, called a CUSIP number). The amount of the forbidden loss is then noted on a form, called a 1099-B, that brokerages send to the IRS each year to detail stock trades.

Beyond that, the IRS has provided no clear guidelines. Instead, the agency has commented on only a few little-used scenarios, while directing taxpayers to “consider all the facts and circumstances” of a trade. Is it OK to swap Vanguard’s ETF tracking the S&P 500 for Blackrock’s version of the same index? Some tax experts say yes, some say no. Besides the IRS’ vague guidance, there are few relevant court cases, and all are decades old. (The IRS declined to comment.)

ProPublica’s analysis of its IRS data found dozens of examples of taxpayers switching between funds with the exact same holdings.

If the wash-sale rule is actually “the only thing that is a wash sale is buying and selling the exact same CUSIP,” then it does seem pretty easy to avoid.

SASB

A basic idea is that mortgages are pretty safe. If someone buys a house for \$500,000, and you lend them \$400,000 secured by a lien on the house, you’ll probably get your money back. If they stop paying, you take the house, and you can probably sell it for more than \$400,000. Houses retain their value pretty well, and in fact that value usually goes up over time. Not always! Lots of ways to go wrong with mortgages. But broadly speaking a good idea, and a very popular one.

And then another idea is that you can package a bunch of mortgages and make them even safer. Lend \$400 million against 1,000 houses worth \$500 million, and there’s an even better chance that you’ll get back more than \$400 million. A few borrowers might default and their houses might turn out to be worth less than they borrowed, but if you diversify over a lot of different houses what are the chances that a *lot* of them will go wrong? The answer is “not zero,” it turns out, but again the idea isn’t terrible.

And then a third idea is that you can slice the cash flows to make some of them even safer. Lend \$400 million against 1,000 houses worth \$500 million, and package the \$400 million loan into bonds. The first \$200 million you get back goes to the holders of Tranche A bonds, the next \$100 million to the Tranche B bonds, the next \$90 million to Tranche C and the last \$10 million to Tranche D. Maybe *lots* of borrowers will default and their houses will turn out to be worthless and there will be a huge crisis and even diversified portfolios will lose money, but *not the Tranche As*, right? That would require wiping out the \$200 million of B and C and D tranches; it would require the houses to lose more than half of their value. So those Tranche A bonds can get AAA ratings from ratings agencies

and investors will buy them as perfectly safe investments.

And then a fourth idea — or maybe it's more like subtracting a previous idea? — is to do that slicing with a single mortgage on one big building. You have an office building that's worth \$500 million, you borrow \$400 million against it, you slice that debt into tranches, and the, say, \$200 million that gets repaid first is much safer than the rest of it, so it gets a AAA rating. What are the chances that this big office building downtown will lose more than half of its value and impair the AAA-rated debt?

I mean, not that low? “It is virtually impossible for a diversified portfolio of prime office buildings to lose two-thirds of its value” is the sort of thing that (1) sounds a bit sketchy when I say it like that but (2) is reasonably acceptable as a claim in modern structured finance. But “it is virtually impossible for a single office building to lose two-thirds of its value” seems much sketchier. Bloomberg's Carmen Arroyo, Natalie Wong, Aaron Gordon and Christopher Cannon report:

Of all the hot spots across global finance that were upended by the pandemic, few remain as fragile as the commercial mortgage-backed securities market. And within this market, the pain is most acute in a new breed of bonds, known as SASBs, that buildings like 1407 Broadway represent.

SASB stands for “single asset, single borrower”: Just a mortgage on a building, sliced into tranches, some of which are rated AAA:

A Bloomberg analysis of almost every SASB tied to a US office property, more than 150 in all, revealed that creditors across numerous deals are on track to get only a portion of their original investment back. In multiple cases, the losses will likely reach all the way up to buyers of the AAA portions of the debt.

This is in large part because unlike conventional CMBS, which bundle together hundreds of property loans, SASBs are typically backed by just one mortgage tied to one building. ...

“There will be deals that are horrific, where the AAAs may not be paid off in full and there's basically no bid for the asset,” said TJ Durkin, head of structured credit and specialty finance at TPG Angelo Gordon. “The investment community thought the real estate would never become obsolete. It ended up being wrong.” ...

“The AAA rating is designed to be a debt security that would typically default less than once every 5,

000 years,” said John Griffin, a chaired professor of finance at the University of Texas in Austin. “Yet, here we are not far from the financial crisis observing defaults,” he said, adding that “it does not appear that the major issues in structured finance have been fixed.” ...

Over a quarter of outstanding SASB bonds originally rated AAA by S&P have had their credit rating cut, compared to just 0.4% for so-called conduit CMBS that pool large numbers of mortgages, according to data from Barclays Plc. For KBRA, 17% of outstanding AAA SASBs have been downgraded, versus just 0.3% of conduits.

“Rating agencies need to revisit how they rate the AAA in these deals if they are single asset, as they don’t have the benefit of pooling,” said Leo Huang, head of commercial real estate debt at Ellington.

I sometimes think that the ultimate purpose of finance is to find progressively more intricate ways to package cash flows to get AAA ratings. SASBs are weird in that they are, relative to the previous state of the art (diversified commercial mortgage-backed securities), a *simpler* way to package cash flows to get AAA ratings.

Infinite free money

I really do wonder how people [thought this would work](#):

JPMorgan Chase has begun suing customers who allegedly stole thousands of dollars from ATMs by taking advantage of a technical glitch that allowed them to withdraw funds before a check bounced.

The bank on Monday filed lawsuits in at least three federal courts, taking aim at some of the people who withdrew the highest amounts in the so-called infinite money glitch that went viral on TikTok and other social media platforms in late August.

A Houston case involves a man who owes JPMorgan \$290,939.47 after an unidentified accomplice deposited a counterfeit \$335,000 check at an ATM, according to the bank.

Here is [that Texas complaint](#):

On August 29, 2024, at a walk-up ATM at 9:42 p.m. at night, a masked man deposited a check (the

“Check”) into Defendant’s Account in the amount of \$335,000.00 (the “Funds”).

After the deposit, on August 30, 2024 at 11:10 a.m., Defendant withdrew \$10,000.00 in-person at a Houston-area Chase branch. Approximately one hour later, Defendant wired \$100,000.00 from a different Chase branch. Then, two hours after that, Defendant purchased a cashier’s check for \$150,000.00. Defendant continued his scheme the next day and withdrew \$40,000.00 and \$20,000.00 just two minutes apart. In sum, Defendant has withdrawn or transferred at least \$320,000.00 of the original \$335,000.00 counterfeit deposit.

I suppose the answer is that they thought they’d just disappear: The Texas “Defendant has not responded to any of Chase’s correspondence, has not communicated with Chase in any other manner, and has not returned the Funds.” If the trade here is “open a Chase account, write yourself a fake check for \$335,000, deposit it one night while wearing a mask, walk in the next day and withdraw the money, then disappear forever,” I suppose that might possibly have positive expected value. Still seems like a lot of work.

Things happen

Boeing Raises \$21 Billion in Capital to Repair Balance Sheet. Wall Street Sees Lines Blur Between Private Credit and Bank Debt. Robinhood Joins Elections Betting Game Ahead of Voting Day. China [loses third of its billionaires](#) as economy falters. Tycoon Who Borrowed \$60 Is Now Worth \$5 Billion on India IPO. Saudi Arabia’s [wealth fund pivots](#) from international investments. Microsoft accuses Google of ‘[shadow campaigns](#)’ to undermine its business. How the Triumph of Cozy Office Wear Made [Dockers](#) a Bad Fit at Levi Strauss. Adidas receives €100mn boost from [Kanye West settlement](#). Elon Musk [compound](#). Musk Says AI Likely Great, 10-20% Chance It ‘Goes Bad.’ Softbank’s Son Says Nvidia Is Undervalued as Super AI Looms. Subway sandwiches are short on meat, [lawsuit claims](#). Timothee Chalamet came to a Timothee Chalamet [lookalike contest](#). “Gummy represents a huge opportunity.” Negative [coupon](#).

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Trump Media Rally Hits 330% as Polls Show Election in Dead Heat

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Oct. 29, 2024, 10:22 AM PDT

Bailey Lipschultz

Bloomberg Editorial



- Stock rallies 15% after erasing gains amid volatility halts
- Shares have traded alongside betting markets for Trump win

By Bailey Lipschultz

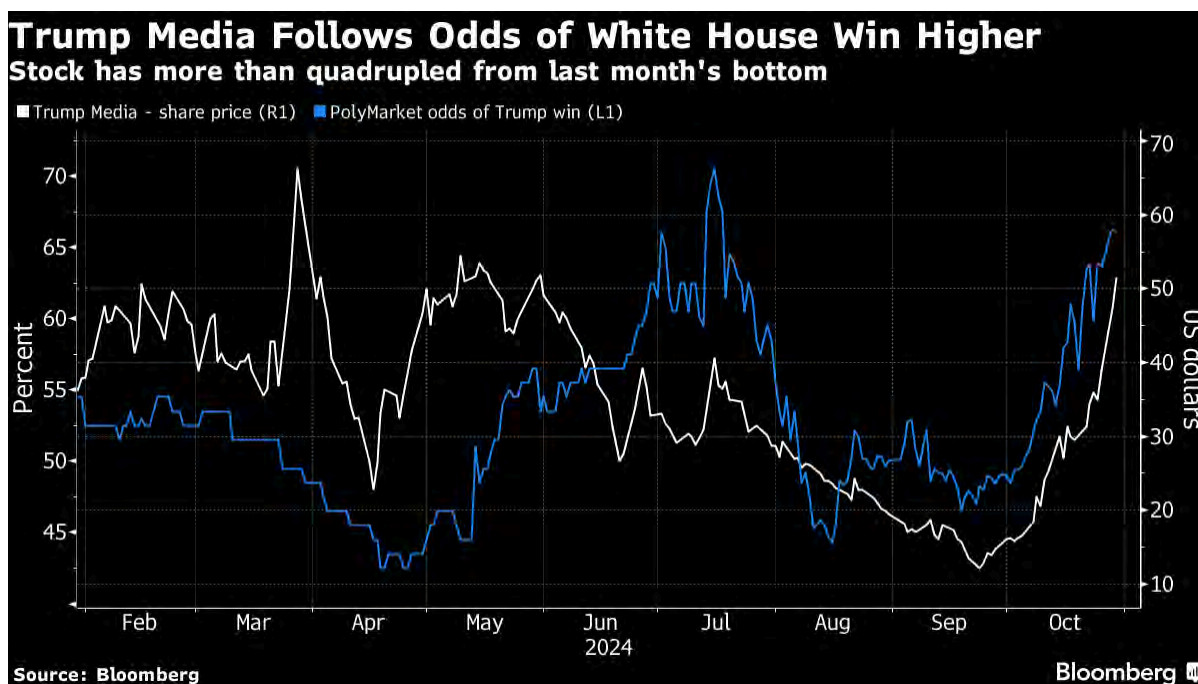
(Bloomberg) --

Shares in Donald Trump's social media company extended a five-week rally that's added more than \$8 billion in value to a company some expect will benefit sharply if the former president wins next week's election.

Trump Media & Technology Group Corp. rose 15% Tuesday, pushing its five-week rally to 330%. That's ballooned Trump's paper gain in the company to roughly \$6 billion.

The firm, which owns the X-lookalike social media platform Truth Social, has at times traded like a proxy for sentiment of Trump's perceived chances of winning the US presidential election on Nov. 5. Some corners of the market have increasingly placed wagers on a Trump victory, pointing to betting market sites where gamblers give him a two-to-one chance despite national polling averages showing a virtual dead heat between Trump and Democrat Kamala Harris.

Trading volume in Trump Media has soared in recent days, and spiked higher early Tuesday as more than 133 million shares changed hands by 1:10pm in New York, more than five-times what's been seen on average in that period over the past month. The surge in interest comes as Trump Media's business performance remains lackluster.



“The line between gambling and trading has become increasingly blurred,” said Steve Sosnick, chief strategist at Interactive Brokers, referring to the broader moves across a group of stocks favored by retail traders who cater to the former president’s supporters.

The volatility also emerged in other companies loosely associated with Trump’s political fortunes. Among those companies was Peter Thiel-backed video network Rumble Inc., which swung between a 5.6% gain and an 8.5% drop Tuesday. Phunware Inc., a money-losing software company that designed the app for Trump’s 2020 campaign, fell more than 20% at one point before trimming losses to 15%.

Bitcoin, another trade market watchers say is driven to some degree by Trump’s perceived chances, surged past \$70,000 and is on the cusp of an all-time high.

Read More: Bitcoin Tops \$71,000 for First Time Since June as Election Nears

--With assistance from David Marino.

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Amanda Fung, Bailey Lipschultz

Musk Gives \$2 Million to Support Texas Appeals Court Candidates

B [bloomberglaw.com/product/blaw/bloomberglawnews/litigation/X8IM81K0000000](https://www.bloomberglaw.com/product/blaw/bloomberglawnews/litigation/X8IM81K0000000)

Elon Musk, founder of SpaceX and chief executive officer of Tesla Inc., listens during a discussion at the Satellite 2020 Conference in Washington on March 9, 2020.

Photographer: Andrew Harrer/Bloomberg

Elon Musk has contributed \$2 million to a Texas political group backing Republican candidates for intermediary appeals courts, campaign finance reports released this week reveal.

Musk's revocable trust on Sept. 27 donated to Judicial Fairness PAC, which has previously reported contributions from other Texas billionaires. Among them are Robert Rowling of Omni Hotels, Ken Fisher of Fisher Investments, and Jeff Hildebrand of Hilcorp Energy.

- The contribution deepens Musk's investment in Texas politics following his relocation to Austin in 2020. Ten days before the judicial donation, Musk gave \$1 million to another PAC backing Republican candidates for the state legislature, a report from earlier this month showed.
- Judicial Fairness PAC has spent \$17 million in the November election, a staggering amount in support of candidates and races with little name ID. The group had \$500,000 on hand as of Saturday, the report showed.
- Eight of the PAC's 16 backed candidates are running for seats in Dallas, whose lone GOP justice is on the ballot and facing a Democratic challenger. Four others are in San Antonio, and four are in Edinburg.

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The U.S. Government Is Plowing Billions into SpaceX, Overlooking Drug Use, Sex Parties, and Elon Musk's Coziness with Putin

 wallstreetonparade.com/2024/10/the-u-s-government-is-plowing-billions-into-spacex-overlooking-drug-use-sex-parties-and-elon-musks-coziness-with-putin

Sampling of U.S. Government Contracts Awarded to SpaceX	
Product and Service Code (PSC)	Obligations
V126 - TRANSPORTATION/TRAVEL/RELOCATION- TRANSPORTATION: SPACE TRANSPORTATION/LAUNCH	\$14,823,667,002
AR32 - R&D- SPACE: FLIGHT (APPLIED RESEARCH/EXPLORATORY DEVELOPMENT)	\$2,793,249,852
AJ47 - R&D- GENERAL SCIENCE/TECHNOLOGY: ENGINEERING (COMMERCIALIZED)	\$1,370,900,640
AR12 - R&D- SPACE: AERONAUTICS/SPACE TECHNOLOGY: APPLIED RESEARCH/EXPLORATORY DEVELOPMENT	\$191,745,207
AC23 - R&D- DEFENSE SYSTEM: MISSILE/SPACE SYSTEMS (ADVANCED DEVELOPMENT)	\$143,842,303
NAME NOT PROVIDED, POSSIBLY A CLASSIFIED PROJECT	\$89,086,630
AR13 - R&D- SPACE: AERONAUTICS/SPACE TECHNOLOGY (ADVANCED DEVELOPMENT)	\$50,909,030
AC25 - R&D- DEFENSE SYSTEM: MISSILE/SPACE SYSTEMS (OPERATIONAL SYSTEMS DEVELOPMENT)	\$34,969,731
AC13 - R&D- DEFENSE SYSTEM: AIRCRAFT (ADVANCED DEVELOPMENT)	\$25,511,254
AZ11 - R&D- OTHER RESEARCH AND DEVELOPMENT (BASIC RESEARCH)	\$20,634,479
Source: USASpending.gov	

By Pam Martens and Russ Martens: October 29, 2024 ~

Last week the Wall Street Journal reported that Elon Musk, the CEO and largest shareholder of the private space exploration and satellite company, SpaceX, has been communicating with Russian President Vladimir Putin for two years. Putin is on a U.S. sanctions list for his invasions of Ukraine. The head of NASA, former U.S. Senator Bill Nelson, quickly asked for an investigation into the matter.

NASA has awarded billions of dollars in government contracts to SpaceX, investing alongside some dubious venture capital firms whose typical motives are to get rich quick in a hot Initial Public Offering (IPO) when the company goes public on a stock exchange.

SpaceX has also been awarded billions of dollars in government contracts from the U.S. Department of Defense, including classified contracts for spy satellites. Musk has stated publicly this month that he holds a Top Secret security clearance related to his leadership role at SpaceX.

Over \$4 billion in U.S. government contracts awarded to SpaceX have been earmarked as R&D (Research and Development), raising the concern that the dozens of venture capital firms that are invested in SpaceX, may eventually get rich on the U.S. taxpayers' money that built the company. (See graph above.)

Elon Musk, better known as the CEO of electric-vehicle maker Tesla and the richest man in the world, was profiled in two shocking Wall Street Journal articles in January and February of this year regarding his use of illegal drugs. The Wall Street Journal's January 6, 2024 (paywall) article carried this assessment of Musk's drug use:

"The world's wealthiest person has used LSD, cocaine, ecstasy and psychedelic mushrooms, often at private parties around the world, where attendees sign nondisclosure agreements or give up their phones to enter, according to people who have witnessed his drug use and others with knowledge of it. Musk has previously smoked marijuana in public and has said he has a prescription for the psychedelic-like ketamine."

Instead of the U.S. government publicly announcing an investigation and suspension of Musk's Top Secret clearance until the allegations in the Wall Street Journal articles of January and February were verified, the U.S. government awarded hundreds of millions of dollars more to SpaceX.

Musk is not the only potential security risk at SpaceX. According to Emily Chang, host and executive producer of "The Circuit" on Bloomberg Originals and author of the book, *Brotopia*, a member of the Board of Directors of SpaceX, Steve Jurvetson, held a sex party at his home in June 2017 where drugs were openly used. (See [here](#) and [here](#).)

The New York Post reported that Elon Musk attended that party, dressed in "spikes and chains." According to Chang, the invitation to the party asked guests to wear "glamazon adventurer, safari chic and jungle tribal attire."

At the time of the party, Jurvetson was a named partner of the venture capital firm, Draper Fisher Jurvetson (DFJ), an investor in SpaceX. While the explosive headlines about the party at his home led to his departure from DFJ and from the Board of Tesla, he inexplicably remained on the Board of Directors at SpaceX – a company with Top Secret contracts with the U.S. government.

According to in-depth information on the history of SpaceX, its Board of Directors and its investors available at PitchBook, Jurvetson remains on the Board of Directors of SpaceX, where he has served since 2009.

Does the U.S. government really want to send the message to American taxpayers that sex parties and illegal drug use are not disqualifiers for having access to national security secrets?

Every American, at this point, should be asking if the U.S. intelligence agencies and the U.S. Department of Justice are afraid to take on powerful billionaires and are putting the U.S. national security at risk as a result.



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Moderna Brass Hit With Investor Suit Over RSV Shot Claims

By **Emilie Ruscoe**

Law360 (October 28, 2024, 8:37 PM EDT) -- Officers and directors of Moderna face shareholder derivative allegations that they overstated how effective the company's RSV vaccine candidate was as the pharmaceutical giant sought regulatory permission to expedite its development.

In a **complaint** filed Monday in Boston federal court, plaintiff James Chislock alleged that the Moderna brass breached their fiduciary duties by hiding that the vaccine for treating respiratory syncytial virus "was less effective than defendants had repeatedly represented" as they prepared to ask the U.S. Food and Drug Administration for breakthrough therapy designation to expedite development of the treatment.

Chislock pointed to the company's announcement in January 2023 that a Phase 3 trial for its RSV vaccine for older adults had resulted in a vaccine efficacy metric of 83.7%.

On the basis of those results, Chislock said, the FDA granted the company's request to fast-track development of its drug.

In May 2024, Moderna said the FDA had approved its RSV vaccine for adults over 60 but stated the drug's efficacy as 78.7%, a rate "significantly lower" than its previously referenced rate of nearly 84%, Chislock said.

The announcement saw trading prices for Moderna shares tumble nearly 6% from over \$151 to under \$143, according to the investor.

In June, Chislock said, Moderna shares fell over 11% from nearly \$138 to over \$122 after the company announced that 18 months after patients received its RSV, the vaccine was about 50% effective. This represented "a significantly lower efficacy rate than vaccines produced by Moderna's competitors," according to the investor.

Chislock claimed that the efficacy misrepresentations left the company vulnerable to liability, pointing to a proposed investor class action filed in the district in August making securities fraud **claims** over the efficacy rate change.

"The company will continue to incur significant sums in relation to the securities class action and any liability or settlement that results," he said, noting that it had already seen major costs in connection with the action and that any internal investigations and adjustments to its internal controls would cost it more.

"As a direct and proximate result of the individual defendants' conduct, Moderna has suffered and will continue to suffer a loss of reputation and goodwill, and a 'liar's discount' that will plague the company's stock in the future due to the company's and the individual defendants' misrepresentations," the investor said.

The defendants include the company's CEO Stephane Bancel, Chief Financial Officer James M. Mock, President Stephen Hoge and nine members of its board, including Bancel and Moderna co-founders Noubar Afeyan and Robert Langer.

Counsel for Chislock and representatives for Moderna didn't immediately respond to requests for

comment Monday.

Chislock is represented by Joshua Baker, Phillip Kim and Erica Stone of the Rosen Law Firm PA.

Counsel information for the defendants wasn't immediately available Monday.

The case is Chislock v. Bancel et al., case number 1:24-cv-12722, in the U.S. District Court for the District of Massachusetts.

--Editing by Rich Mills.

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Report Says To Allow Bulk Of Software Investor Suit

By **Mike Curley**

Law360 (October 28, 2024, 1:17 PM EDT) -- A U.S. magistrate judge has recommended against dismissing the bulk of an investor's suit alleging Decentral Life Inc. and a group of its licensees, including a cannabis social media site, misled him into investing more than \$1.7 million by boasting bogus user counts.

In a **report** filed Thursday, U.S. Magistrate Judge Scott T. Varholak only recommended that the court dismiss Alan Lamothe's claims for civil conspiracy and violations of the Colorado Consumer Protection Act, but found that Lamothe adequately alleged his fraud-based securities claims.

According to the report, the civil conspiracy claim fails both because Lamothe did not allege facts supporting an allegation that there was a "meeting of the minds" to agree to mislead investors, and because the defendants' officers, Ken Tapp and Gregory Todd Markey, are part of the entities involved, and thus could not have conspired with themselves.

As to the CCPA, Judge Varholak found that it does not apply to securities claims, which are handled by the Colorado Securities Act, and even if the court considered the act to be applicable, Lamothe hasn't alleged any public harm, only his own damages.

Lamothe sued the companies, including MjLink.com, HuntPost.com Inc. and LikeRE.com, in December, **claiming** that Tapp and Markey made false statements that he relied on to buy shares in Decentral and MjLink, including estimates of monthly active users in the millions. Lamothe claims he later discovered that the sites' users at most numbered in the thousands, many of which were dummy accounts or duplicates from the site's administrators to bolster user counts.

MjLink.com is a cannabis social media site, and the others are a real estate social network site and a platform for outdoor sports enthusiasts. They all use Decentral software.

In February, the defendants **moved to dismiss** the initial complaint, calling it "disorganized and often incomprehensible" and arguing that it fell far below federal pleading standards. Lamothe filed an amended complaint in March, and **in April** the defendants again moved to dismiss, arguing claims were still too vague and failed to show how they deceived Lamothe.

In Thursday's report, Judge Varholak disagreed, saying Lamothe adequately alleged how Tapp and Markey misled him through statements on podcasts, and how he purchased the stocks based on his belief the company was doing well.

The judge further found that given the connections among the companies — including that Tapp and Markey served as officers for them all — Lamothe is allowed to group together allegations about their alleged misrepresentations.

While the defendants also argued that Lamothe didn't provide specificity about all of his stock purchases, the judge wrote that isn't necessary at this stage, and the specific dates that Lamothe did provide are sufficient this early in the litigation to support a claim that he bought the securities as a result of the alleged statements.

And although the complaint does not specify that Lamothe listened to the podcasts, the judge wrote that it does sufficiently show that he relied on the statements made in those podcasts.

The judge further found that statements made after Lamothe's initial purchase are still actionable,

given Lamothe's allegations that those statements led him to continue purchasing the stocks past his initial investment.

Judge Varholak also rejected the defendants' argument that the statements were puffery or opinion, saying that the complaint alleges they made statements about user counts, which could be proven true or false, and misled investors by focusing on those allegedly false numbers.

"These statements made by defendants are more than just optimism or puffery about future performance; they use specific, numerical data about the companies' existing user bases and specific plans for the growth of the company," the judge wrote.

The defendants also sought to dismiss Lamothe's fraud by omission claims as duplicative of the misrepresentation claims, but Judge Varholak wrote that they are based on distinct actions — while the misrepresentation claim is based on affirmative statements, the judge wrote that the omissions claims are based on the companies' failure to later disclose that their user numbers were false.

And the judge found that the user counts are central to the companies' business models, and as such the complaint sufficiently alleged that the falsity of those numbers was material information, and that Tapp and Markey would have known they were material.

Judge Varholak also rejected the defendants' argument that Lamothe failed to allege specific damages necessary to support his negligent misrepresentation claims, finding that Lamothe's allegation that he invested \$1.7 million into the companies when the securities were allegedly not worth that total is enough to keep the claim afloat.

An attorney for Lamothe declined to comment Monday.

Representatives for the defendants could not immediately be reached for comment Monday.

The defendants are represented by Eric J. Benzenberg and Mark R. Basile of the Basile Law Firm PC.

Lamothe is represented by Lauren E.M. Thompson of Foster Graham Milstein & Calisher LLP and Christa P. McLeod and Shomik Ghosh of Spiro Harrison & Nelson LLC.

The case is Lamothe v. Decentral Life Inc. et al., case number 1:23-cv-03251, in the U.S. District Court for the District of Colorado.

--Additional reporting by Gina Kim. Editing by Daniel King.



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1st Circ. Scraps Securities Fraud Case Against 3D Printing Co.

By **Brian Dowling**

Law360 (October 29, 2024, 1:54 PM EDT) -- The First Circuit has affirmed a ruling throwing out a securities fraud lawsuit against 3D printing business Desktop Metal, finding the investor behind the action abandoned one of her claims and failed to adequately allege the other.

A three-judge panel said Monday that a Boston federal judge was right to **dismiss** the proposed class action in September 2023 because it failed to put forward actionable misleading statements related to problems with two Desktop Metal products that were later recalled.

In her complaint, investor Sophia Zhou said executives and an acquired dental business, EnvisionTEC Inc., **misled her and other investors** by making false statements about two products that were later recalled following a whistleblower complaint, which raised alarms about production and manufacturing issues that allegedly violated U.S. Food and Drug Administration rules.

In particular, the lawsuit claimed violations under the Private Securities Litigation Reform Act of 1995 through a material misrepresentation theory and a separate scheme liability claim.

Desktop Metal and the rest of the defendants primarily attacked the first theory about misrepresentations and successfully convinced U.S. District Judge Indira Talwani that the suit lacked actionable statements. Zhou's appeal, however, maintained the lawsuit should remain live because Desktop Metal's dismissal bid failed to address her alternate scheme liability theory.

The First Circuit, in the opinion penned by U.S. Circuit Judge Julie Rikelman, found Zhou failed to substantially air the alternate theory during briefing and argument, ultimately waiving the claim.

The investor pointed to the party presentation principle — explaining that Desktop Metal never attacked the scheme theory — but the panel said her reading "would turn the party presentation principle on its head."

"In Zhou's view, the district court had the obligation, when faced with a motion to dismiss her entire complaint, to comb through all 200 pages for any plausibly alleged legal theory and assess whether defendants adequately addressed each theory regardless of whether Zhou raised it in her own responsive brief," the court said. "This would be unworkable to say the least."

The First Circuit added that the responsibility is on litigants to air the arguments because "overburdened trial judges cannot be expected to be mind-readers."

The panel also agreed that Judge Talwani was correct to dismiss the lawsuit because the complaint insufficiently pled the alleged misstatements made by Desktop Metal and EnvisionTEC executives.

The statements in Zhou's complaint sketch out a showing of corporate mismanagement and harm to the defendant's customers, but they "do not make out a claim that Desktop Metal defrauded its investors through material misrepresentations," the court said.

Representatives for the parties were not immediately available for comment on Tuesday.

Zhou is represented by Lucas E. Gilmore, Steve W. Berman, Kevin K. Green and Raffi Melanson of Hagens Berman Sobol Shapiro LLP.

The defendants are represented by Roman Martinez, Kristin N. Murphy, William J. Trach and Jeff G. Hammel of Latham & Watkins LLP.

The case is Zhou v. Desktop Metal et al., case number 23-1843, in the U.S. Court of Appeals for the First Circuit.

--Editing by Philip Shea.

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Fidelity Investments Sued Over Money Market Fund's Fees

By **Katryna Perera**

Law360 (October 28, 2024, 9:02 PM EDT) -- Fidelity Investments has been hit with a class action suit in New York federal court alleging it charged high fees, mismanaged the administration of one of its money market funds, and failed to act in the best interests of the fund's shareholders.

Plaintiffs Bryan Davis and Ethan Sam filed a **complaint** Friday against Fidelity Investments — formerly known as Fidelity Management & Research Company LLC — current and former trustees of the Fidelity Government Money Market Fund, and the fund's executives. According to the complaint, Davis and Sam are accountholders of a Fidelity retirement account, and Davis also has a Fidelity taxable brokerage account.

The Fidelity Government Money Market Fund, also known as the Government Fund, is the largest and most popular money market mutual fund in the Fidelity Investments portfolio and holds about \$351 billion in net assets, according to the complaint.

The named trustee and officer defendants oversee the Government Fund and, therefore, owe fiduciary and contractual duties to the fund's shareholders, the complaint states. Davis and Sam allege the individual defendants breached their fiduciary duties by failing to act in the best interests of the fund's shareholders.

Davis and Sam claim the individual defendants caused them and other shareholders of the fund's "retail" share class to incur unnecessary higher expenses even though they were eligible for the fund's lower-expense but otherwise identical "premium" share class.

"These unnecessary expenses cost these shareholders millions of dollars each year, reducing their return on investment in the Government Fund and unjustly enriching Fidelity," the complaint stated.

According to the complaint, the fund's retail and premium class shares are identical except for the minimum required to initially invest in the shares and the operating expenses charged to shareholders.

Davis and Sam say the overcharging of retail class shareholders who meet the investment minimum for premium class shares could have been easily remedied through share class conversion, where an eligible investor's shares are automatically converted from one share class to another within the same mutual fund.

The complaint states that auto-conversion is common in the mutual fund industry, and other Fidelity mutual funds allow auto-conversion. The Government Fund is the one exception.

Davis and Sam argue share class conversion does not harm shareholders, the fund, or the overarching trust since it is a non-taxable transaction that only benefits eligible shareholders by reducing the operating expenses they pay for an identical investment in the fund.

In the case of the Government Fund, the complaint states that the savings for class shareholders with auto-conversion would be "substantial."

"Expenses for the Government Fund's premium class are typically 24% lower than expenses for the retail class. The savings to the class shareholders realized by share class conversion would not even

come at a cost to the Government Fund or the trust, but rather to the fund's contracted investment manager, defendant Fidelity, which collects the expenses paid by shareholders as its management fee," the complaint stated.

"Conversion (or a functional equivalent) is therefore an obvious and necessary decision for the fund's trustees and officers to implement in order to act in the best interests of the class shareholders," the complaint further stated. "Instead, the trustee and officer defendants have continued to allow Fidelity to extract higher expenses from shareholders, whose interests they are charged with protecting."

Davis and Sam allege the defendants have done nothing to ensure that the impacted retail class shareholders pay the lower operating expenses they are entitled to despite knowing and having the ability to provide share class conversion.

"Either the trustee and officer defendants have been recklessly uninformed of these massive overcharges that cause significant losses to the class shareholders, or have known about the issue and inexcusably failed to take action to remedy it," the complaint said. "Either way, their conduct was and is outside the bounds of reason."

This conduct has caused losses to shareholders but has also allowed Fidelity to "profit handsomely," according to the complaint, since the operating expenses charged to shareholders are management fees paid to Fidelity.

"Fidelity currently collects more in fees annually from the Government Fund than from any other mutual fund in the Fidelity mutual fund complex. In the past three fiscal years, it has collected approximately \$1.95 billion in fees from the Government Fund," the complaint said. "Fidelity ... makes unjustified profits from the excess expenses that should remain in the class shareholders' pockets."

Davis and Sam also allege many of the individual defendants are not motivated to fix the issue because they also profit from it, such as defendant Abigail Johnson, who, along with her family, is the 49% owner of Fidelity's parent company, so she is "directly enriched" at class shareholders' expense.

The other interested trustees and the officers are employed by Fidelity or compensated by Fidelity for their service to the fund, according to the complaint.

The suit seeks damages, restitution, disgorgement, attorney fees and a jury trial.

In a statement to Law360 on Monday, Halley Josephs of Susman Godfrey LLP, counsel for the plaintiffs, said, "Our clients are the first to assert these classwide claims involving Fidelity's largest money market mutual fund, and it is the result of months-long research and analysis into the failure of Fidelity and the fund's management to act in the best interests of the fund's shareholders."

Representatives for the defendants did not immediately respond to requests for comment Monday.

Davis and Sam are represented by Shawn J. Rabin, Lisa X. Jing and Halley W. Josephs of Susman Godfrey LLP.

Counsel information for the defendants was not immediately available.

The case is Davis et al. v. Fidelity Management & Research Company LLC et al., case number 1:24-cv-08142, in the U.S. District Court for the Southern District of New York.

--Editing by Janice Carter Brown.



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Apple's \$20M Watch Defect Deal Gets OK With More Details

By **Lauren Berg**

Law360 (October 28, 2024, 7:57 PM EDT) -- A California federal judge gave his blessing Friday to Apple's \$20 million settlement to resolve a proposed class action alleging certain Apple Watches have a battery defect that can cause serious injuries, after telling counsel earlier this month to submit additional information about the deal's value.

U.S. District Judge Haywood S. Gilliam Jr., in a 15-page **order**, granted preliminary approval of the settlement, under which potentially millions of class members could receive between roughly \$20 and \$50, after the plaintiffs' attorneys **provided more information** about how the value of the proposed deal compares to a "reasonably likely result at trial."

Counsel calculated that if all the consumers paid Apple \$79 for a battery service to repair the watch, the total amount those consumers paid would be roughly \$49.4 million, but they noted that the figure is lower because some consumers received a free replacement through the company's warranty programs, according to the brief filed Oct. 18.

But because continuing the case to trial carried a big risk of a lesser recovery or none at all, counsel said the discounted settlement the plaintiffs accepted to resolve the case immediately "was more than reasonable."

After initially **declining to approve** the deal without more information about its value, Judge Gilliam found Friday that counsel's supplemental brief makes it clear the settlement provides about 40% of the possible recovery using the service costs damages model, according to the order.

"Given the substantial risks that plaintiffs identify if the case were to go forward, the court finds that the settlement amount is reasonable and weighs in favor of granting preliminary approval," the judge said.

Representatives for the parties did not immediately respond to requests for comment Monday.

The newly-stamped settlement aims to resolve litigation initially launched in December 2021 by Alabama resident Chris Smith and other consumers, claiming that Apple's First Generation, Series 1 through 6 and Series SE Apple Watches contain lithium cobalt oxide batteries that can swell, causing the watches' screens to shatter and expose watch-wearers to razor-sharp edges that have allegedly caused burns and deep, long cuts around their wrists and forearms.

The consumers asserted that Apple was aware of the alleged defects but hid them from the public despite selling tens of millions of purportedly defective watches to potential class members, who paid between roughly \$250 and over \$1,000 for the digital watches.

After multiple rounds of pleading, Judge Gilliam **trimmed several claims**, but in February 2023, he allowed the consumers to amend the remaining allegations.

In May 2023, Apple asked the judge to **throw out the case entirely**, arguing that the consumers had failed three times to adequately plead their claims and their time had run out.

After briefing was completed on the motion, but before the judge ruled, the consumers asked the court for permission to amend their lawsuit again to beef up the allegations with more details on the

alleged defect that they had recently learned in discovery.

Apple quickly opposed the request, but Judge Gilliam granted it on Oct. 30, 2023. A day later, the consumers filed an amended complaint, and on Nov. 3, the parties told the judge they had reached a settlement in principle. They asked the court to pause litigation deadlines to finalize the terms of the deal, which Judge Gilliam agreed to do.

This August, the consumers filed their motion seeking preliminary approval of the settlement, which proposes to award class members \$20 for each covered device, or a pro rata share of the net settlement fund if the per-class member amount is less than \$20.

If there's more than \$50,000 remaining in the net settlement fund after \$20 payments are made to all claimants, then the remaining funds will be distributed among claimants evenly up to \$50 per claimant, while any additional funds remaining will go to a cy pres recipient — meaning an organization designated by the court, according to the motion.

Judge Gilliam held a hearing on the motion on Oct. 3 but didn't rule from the bench. On Oct. 15, he issued his order, noting that he had reviewed the motion and the proposed settlement in greater detail since the hearing, and that he still needed more information.

Plaintiffs counsel filed their additional briefing on Oct. 18.

The customers are represented by Steven Nicholas and Lucy E. Tufts of Cunningham Bounds LLC, Benjamin H. Kilborn Jr. of Kilborn Law LLC and Michael F. Ram and Marie N. Appel of Morgan & Morgan PA.

Apple is represented by Erin M. Bosman, Claudia M. Vetesi, Penelope A. Preovolos and Alexis A. Amezcua of Morrison Foerster LLP.

The case is Chris Smith et al. v. Apple Inc., case number 4:21-cv-09527, in the U.S. District Court for the Northern District of California.

--Additional reporting by Dorothy Atkins and Gina Kim. Editing by Jay Jackson Jr.



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Attys Seek \$48M Fees For Hooking \$152M In Tuna Fixing Deals

By Clara Geoghegan

Law360 (October 28, 2024, 3:43 PM EDT) -- Lawyers for a class of consumers that sued three of the largest tuna producers accusing them of conspiring to fix tinned fish prices asked a California federal court to approve nearly \$50 million in legal costs after a settlement this summer ended nearly nine years of multidistrict litigation.

In total, the class of tuna buyers have obtained \$152.2 million in settlements and the \$48.3 million in attorney fees and \$1.6 million in legal expenses requested by 35 law firms would account for about 33% of the net cash settlements, according to a **motion filed Friday** by Wolf Haldenstein Adler Freeman & Herz LLP, lead counsel for the class. Wolf Haldenstein said the firms have put in more than 74,000 hours on the case since 2015 and that the total fee request is 18% lower than the total amount of billed hours by the firms.

"The request is fair and reasonable considering the outstanding settlement obtained, the substantial efforts by class counsel, and the considerable litigation risks faced by class counsel at every stage of this nine-year old complex antitrust litigation," Wolf Haldenstein said in its motion.

Wolf Haldenstein was picked as lead counsel to represent a group of consumers who sued tuna brands Starkist, Bumble Bee, Chicken of the Sea and their parent companies alleging they'd conspired to set prices after news broke that the U.S. Department of Justice was looking into the seafood industry. The consumer litigation and lawsuits brought by grocery stores and other direct purchasers **were consolidated** in the Southern District of California in 2015.

Executives at Bumble Bee and Starkist pled guilty to colluding to fix prices between 2011 and 2013. Bumble Bee **in 2017 pled guilty** to violating the Sherman Act for its role in the scheme and agreed to pay a \$25 million fine, with the fallout from the scandal **pushing it into Chapter 11** in 2019. Starkist **in 2018 pled guilty** to price fixing.

Chicken of the Sea and **its parent company Thai Union Group settled** with both the consumer class and the direct buyers ahead of a civil antitrust trial set for July.

Thai Union Group, which was the longtime shrimp supplier and the largest equity sponsor to bankrupt seafood chain Red Lobster, in 2015 abandoned plans to acquire Bumble Bee amid Department of Justice scrutiny and in the wake of the price-fixing scandal.

Several weeks before the trial, which sought over \$1 billion in damages, attorneys for the plaintiffs, Bumble Bee and Starkist, said they'd reached a settlement.

In August, **the parties asked** the Southern District of California court to sign off on a settlement with Starkist, its parent company Dongwon Industries Co. Ltd. and British private equity firm Lion Capital, which put money into Bumble Bee Foods. The deal, which comprised consumer plaintiffs and direct purchaser plaintiffs, included some \$168 million in cash, plus \$26 million in packaged tuna products.

Attorneys that represented direct buyers in the multidistrict litigation **have asked for** roughly \$20 million in legal fees after negotiating a \$64 million settlement.

Wolf Haldenstein said in its motion that the Chicken of the Sea settlement brought \$16.2 million for

consumers and the second settlement earmarked a combined cash value of \$136 million for consumers, bringing the settlement total to \$152.2 million.

In a declaration alongside Friday's motion, Wolf Haldenstein partner Mark C. Rifkin said 35 law firms representing consumers in the MDL put in 74,280 hours in the case, with his firm accounting for 31,170 of those hours. The average billing rate of the group was \$790 an hour, said Rifkin, bringing the total estimate of legal fees to \$58.6 million.

The total \$48.3 million in requested fees, said Rifkin, was roughly 82% of the actual fees incurred during the case. The motion asks to pay the legal fees over time, in step with the tuna companies' settlement payment schedules.

The motion also proposes paying a total of \$294,000 to 68 individuals who "remained devoted to their duties and actively participated in the litigation."

"We are grateful that our hard work over nine years produced such an excellent result for consumers," said Rifkin in a statement to Law360 on Monday.

Wolf Haldenstein Adler Freeman & Herz LLP, class counsel for the end payer plaintiffs, is represented by its own Betsy Manifold, Rachele Byrd, Alex Tramontano, Mark C. Rifkin, Thomas Burt and Carl Malmstrom.

The case is *In re: Packaged Seafood Products Antitrust Litigation*, case number 3:15-md-02670, in the U.S. District Court for the Southern District of California.

—Additional reporting by Craig Clough, Katryna Perera, Lauren Berg, Bonnie Eslinger, Kevin Penton, Cara Bayles, Eric Kroh, Steven Trader and Hilary Russ. Editing by Michael Watanabe.

Where's The Beef? Subway Customer Sues Over Meaty Ads

By **Bonnie Eslinger**

Law360 (October 28, 2024, 10:10 PM EDT) -- Subway was hit with a putative class action Monday in New York federal court claiming ads for the popular chain's Steak & Cheese sandwich show the product with at least 200% more meat than the subs that are handed to customers.



A suit claims Subway misleads customers with its Steak & Cheese sandwich ads. (Court Documents)

Anna Tollison's suit against Subway Restaurants Inc. and two company subsidiaries seeks to represent New Yorkers who purchased a Steak & Cheese sandwich from one of the sub chain's Big Apple restaurants sometime during the past three years.

"Subway uses photographs in its advertisements that make it appear that the Steak & Cheese sandwich contains at least 200% more meat than the actual sandwiches that customers receive," the suit said.

Customers have complained on social media that Subway's ads for the sandwich are misleading, according to the complaint, adding that the eatery's Cheesy Garlic Steak also draws complaints.

"Subway's advertisements for the product are unfair and financially damaging to consumers as they are receiving a product that is materially lower in value than what is being represented," the suit said.

Tollison said she bought the Steak & Cheese sandwich in August through Subway's mobile application, paid \$6.99 plus tax for the sub and went to a Jamaica, New York, location to pick it up. She had relied on a photo in an ad for the sandwich when she made her selection, according to the **complaint**.

"After she picked up and began eating her sandwich, plaintiff realized that there was barely any steak in the sandwich and that the photographs that she relied on were grossly misleading," the suit said.

Tollison said she expected that the Steak & Cheese sandwich that she ordered would contain about the same amount of meat as shown in the photograph.

"If plaintiff knew that the Steak & Cheese sandwich contained substantially less than the amount of meat as advertised, she would not have purchased said sandwich," the suit states.

Tollison told the court that she has filed her complaint as a proposed class action because she believes all Steak & Cheese sandwich purchasers have been duped in the same manner.

"Plaintiff believes that the class includes thousands of members," the suit said, adding that resolution of the claims through the procedure of a class action "will be of benefit to the parties and the court."

The suit alleges violations of New York Deceptive Acts and Practices Act, noting that in addition to the cost of the sandwich, members of the class also incurred costs traveling to and from the Subway locations where they made their purchase, and sometimes paid tips if the sandwich was delivered.

"As a result of defendants' false advertising, plaintiff and the members of the class are entitled to monetary and compensatory damages, interest, and attorneys' fees and costs, as well as statutory damages of \$500 per unit purchased," the suit said.

The suit named as defendants Subway Restaurants Inc., Franchise World Headquarters LLC and Subway Franchisee Advertising Trust Fund Ltd.,

Back in 2021, Subway faced claims in California federal court that it misrepresented that its tuna products were manufactured with 100%

sustainably caught skipjack and yellowfin tuna. The proposed class action was dismissed in August 2023.

Anna Tollison is represented by James Clayton Kelly of The Russo Firm.

Counsel information for Subway was not available Monday.

The case is Anna Tollison v. Subway Restaurants, case number 1:24-cv-07495, in the U.S. District Court for the Eastern District of New York.

--Additional reporting by Dorothy Atkins. Editing by Rich Mills.

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Philip Morris Nicotine Pouch Suit Not About Labels, Court Told

By **Brian Steele**

Law360 (October 28, 2024, 9:31 PM EDT) -- A lawsuit accusing Philip Morris International of misleading customers of its ZYN nicotine pouches asserts claims under business practices and false advertising statutes, but not the federal labeling law the tobacco giant is invoking in its dismissal bid, the suing consumer told a Connecticut federal court.

In an opposition to dismissal filed Friday, Ethan Norris denied Philip Morris' assertion that his claims challenge the U.S. Food and Drug Administration-approved labeling of the ZYN nicotine pouches and that his suit is **preempted** by the 2009 Family Smoking Prevention and Tobacco Control Act as an impermissible attempt to restrict labels further. He said that he "fell prey" to the company's deceit and wrongly believed that the product would help him quit smoking.

"Despite ZYN merely providing a new delivery mechanism for defendant's addictive nicotine, defendant unfairly and deceptively marketed and promoted ZYN as being healthy and a nicotine-cessation device," the memorandum said. "In actuality, as defendant knew, ZYN: had no health benefits; was not a proven or authorized cessation device; would merely lead to nicotine addiction for new users; and would sustain nicotine addiction for those already addicted."

The claims at issue, Norris said, have "nothing to do with labeling." The allegedly false and misleading advertising and promotion were found on Philip Morris' website, social media and point-of-sale displays, which are exempt from preemption by the 2009 federal law known as the TCA, he argued.

On Oct. 2, Norris dropped Philip Morris subsidiary Swedish Match North America LLC, the creator of ZYN pouches, from the suit. Swedish Match had moved to dismiss the **complaint** against it for lack of jurisdiction, noting that it is organized under Delaware law and headquartered in Virginia, while Norris is a Florida resident targeting its Connecticut-based parent.

Norris said in his memo that ZYN's package "was designed to look like containers for a popular brand of mints" and that the pouches look like gum, but the TCA only concerns labels. The complaint alleges that ZYN is meant to appeal to minors and that Philip Morris omitted material facts about its addictive potential and risk for causing injury using marketing that was likely to deceive a reasonable consumer.

The complaint asked the court for relief including restitution and an unspecified injunction. Philip Morris said Norris lacks standing for injunctive relief because he is no longer in danger of suffering the same alleged fraud-based injury; Norris' memo said that he was withdrawing his request for an injunction.

The memo also said that Norris "hereby strikes" a paragraph from the complaint that does implicate the labeling. The paragraph at issue reads, "The labels on ZYN failed to disclose that ZYN posed significant risks of substantial physical injury resulting from the use of ZYN," but Norris said he would remove it "to avoid any doubt" that labels are not the issue.

In an email to Law360, Philip Morris spokesperson Corey Henry said: "We believe that plaintiff's claims are without merit, and we look forward to filing our reply brief in support of our motion to dismiss. We also believe that our affiliate Swedish Match North America has marketed ZYN responsibly, including by going above and beyond with policies and initiatives designed to prevent

youth access."

Counsel for Norris did not immediately respond to requests for comment Monday.

Norris is represented by James J. Reardon Jr. of Reardon Scanlon LLP, Joshua D. Arisohn, Philip L. Fraietta and Brittany S. Scott of Bursor & Fisher PA and Scott R. Drury of Drury Legal LLC.

Philip Morris is represented by James I. Glasser, Kim E. Rinehart and Ariela C. Anhalt of Wiggin and Dana LLP and Christine G. Rolph, U. Gwyn Williams and Avery E. Borreliz of Latham & Watkins LLP.

The case is Norris v. Philip Morris International Inc. et al., case number 3:24-cv-01267, in the U.S. District Court for the District of Connecticut.

--Additional reporting by Mike Curley. Editing by Bruce Goldman.

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Mass. Court's Wiretap Ruling May Be Bad Omen For Plaintiffs

By **Chris Villani**

Law360 (October 28, 2024, 6:08 PM EDT) -- A ruling by the Massachusetts high court rejecting wiretap claims over website operators' use of tracking software like Meta Pixel and Google Analytics shows the steep climb plaintiffs may continue to face as they try to apply older laws to modern technologies, experts told Law360.

The state's Supreme Judicial Court issued a **split decision** in a case against two Bay State hospitals that found the state's decades-old Wiretap Act is not meant to cover the tracking of websites a person visits or the queries entered on those sites.

Sheri Pan, a privacy litigator at ZwillGen Law LLP, said the state's ruling, while not precedential for other courts, is "significant."

"It's one of the first appellate court decisions that's really weighing in on this recent wave of wiretapping litigation from the last couple of years that specifically target advertising and marketing technologies," Pan said.

Although the various laws have nuances, and the federal wiretap law has been amended to sweep in electronic communications, all the complaints essentially boil down to whether a person communicating with a website is the same as the more "classic" situation of tapping a phone line, Pan said.

"The opinion does a detailed analysis comparing these two situations and concluding that the two are very different. The court says several times they are 'categorically' different," Pan said. "The analysis is significant and certainly would be of persuasive value in these other cases percolating in other jurisdictions."

The majority of the state high court found the wiretap statute was not meant to potentially criminalize the tracking of web browsing, according to a 47-page opinion penned by Associate Justice Scott L. Kafker that seeks to put the ball in the court of lawmakers.

"If the Legislature intends for the Wiretap Act's criminal and civil penalties to prohibit the tracking of a person's browsing of, and interaction with, published information on websites, it must say so expressly," Justice Kafker wrote.

Steven Stransky, a partner and vice chair of the privacy and cybersecurity practice at Thompson Hine LLP, said the majority's willingness to apply the rule of lenity — a standard showing deference to defendants when it's unclear whether a criminal law is applicable to certain conduct — is significant.

"Several wiretapping, pen register and eavesdropping statutes were written prior to the development of modern website cookies and pixels, and they are ambiguous in terms of their applicability to these types of website technology," Stransky said. "This opinion could be a model for other courts analyzing similar issues because there has been a hesitancy for other judges to apply the rule of lenity."

Stransky said the hesitation has been particularly noticeable in website communications cases filed in California under that state's Invasion of Privacy Act.

Daniel Guenther, a litigation attorney at Sherin & Lodgen LLP, noted the decision does leave the door

open for plaintiffs looking to pursue other claims for similar conduct, including negligence, breach of contract or, in Massachusetts, claims under the state's consumer protection statute, Chapter 93A.

But the bar is higher for plaintiffs seeking wins on those grounds when compared to the state's wiretap law, since the latter only requires proving the defendant ran afoul of the law and not necessarily that anyone was harmed by that violation.

"I think a lot of people were watching this decision because of the strength of the wiretap statute, but the decision alludes to the fact that there are a lot of other remedies available for this type of web-tracking," Guenther said. "But the wiretap statute has, in addition to the civil element, potential criminal applications, and under the wiretap statute, there is no need to prove an injury."

Guenther said the ruling could renew legislative efforts, particularly in states like California, Virginia and Connecticut where the issue has come up. But he noted all sides agree the harm is mitigated if users are put on notice that their data is being tracked and may be sold to a third party.

"We are likely going to see more disclosures, more pop-ups when you visit a site that say, 'This is how we are tracking and using your data, and this is who we are giving it to,'" he said. "It's only a violation when it is surreptitious and undisclosed."

Payal Salsburg, a litigation partner at Laredo & Smith LLP, also noted websites will likely have to be more careful with disclosures. In the Massachusetts case filed by plaintiff Kathleen Vita against Beth Israel Deaconess Medical Center and New England Baptist Hospital, the hospitals suggested patient privacy and data would be protected. Associate Justice Dalila A. Wendlandt ripped the hospitals in a blistering dissent that said they had "lied."

"I would be a little careful with making those kinds of arguments where the facts undercut the arguments," Salsburg said of the hospitals' claims, adding she is skeptical the issue will get the attention of lawmakers in the near future.

"This is an issue of first impression, and it's not a situation where all relief is foreclosed; there are still other statutory and common law claims that can provide relief," Salsburg said. "I am not sure this is getting to the point where the Legislature needs to step in now and resolve it."

The cases involving tracking software number well into the hundreds across the country and have hit some major companies. Last month, Nike, its subsidiary Converse and telehealth company Teladoc were each hit with **proposed class actions** in California federal court over allegations they violated the state's "trap and trace" law by using TikTok software to collect personal data from visitors to their websites.

In August, Piedmont Healthcare Inc. **beat a suit** accusing it of unlawfully sharing confidential health information with Facebook.

Experts took note of Justice Wendlandt's 46-page dissenting opinion, in which she said a conversation over the phone between a patient and a doctor, which cannot be bugged, should be treated similarly to a hospital-created electronic forum to allow the same information to be shared through a website.

Star Kashman, a founding partner at the boutique Cyber Law Firm, said she thought Justice Wendlandt's dissent could also be impactful because of the forceful argument it makes that the Massachusetts statute, which includes the words "any communication" when discussing what is covered, is not as ambiguous as the majority suggested.

"The Legislature had the clairvoyance to choose these particular words to indicate that it was the tremendous power of electronic surveillance devices — like the tracking software at issue in the instant cases — to enhance the ability to snoop far beyond what could be done by the human ear alone that defined the scope of the act's protections," the dissent states.

"That is the purpose, to evolve these older laws to include these new tech harms," Kashman said, adding plaintiffs may be left losing one potential avenue of recourse as technology continues to outpace the law in the eyes of some judges.

"My bigger concern about this having a widespread impact is what I have seen in the industry. When people don't understand something, they prefer not to deal with it," Kashman said. "Other individuals will see this opinion, and there is not much case law in the field yet. So when an opinion like this comes out, it does mean a lot."

Kathleen Vita is represented by Patrick J. Valley, Edward F. Haber and Michelle H. Blauner of Shapiro Haber & Urmy LLP.

New England Baptist Hospital and Beth Israel Deaconess Medical Center are represented by David Quinn Gacioch and Annabel Rodriguez of McDermott Will & Emery LLP.

The case is Vita v. New England Baptist Hospital et al., case number SJC-13542, in the Supreme Judicial Court of Massachusetts.

--Editing by Philip Shea and Lakshna Mehta.

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Masimo Sues Founder Over Alleged 'Empty Voting' Scheme

By **Sarah Jarvis**

Law360 (October 28, 2024, 10:58 PM EDT) -- Masimo Corp. has sued its founder for allegedly conspiring with an investment firm and company stockholder to manipulate a shareholder vote in order to maintain his seat on the medical technology company's board of directors.

Irvine, California-based Masimo alleged in its Friday **complaint** that founder Joe Kiani — who was also previously the company's CEO and the chairman of its board of directors — devised a scheme with RTW Investments LP and various affiliates to secretly preserve Kiani's seat on the board. RTW and its affiliates are also named as defendants in the suit.

Per the complaint, one of Masimo's largest shareholders announced in late March that it intended to nominate two independent candidates for election to the company's board, running against Kiani and another nominee "that Mr. Kiani had hand-picked." Kiani stood to be ousted from the board if the independent nominees won the election.

Masimo alleged that shortly after that announcement, Kiani worked with RTW to devise a scheme to increase RTW's voting power by buying company shares in advance of the initial record date for the company's annual meeting — the date on which voting eligibility is determined.

RTW had previously owned just 2.8% of Masimo stock, but the firm more than tripled its position to 9.9% in the days leading up to the initial record date," Masimo alleged. The firm formed a "group" with Kiani, as designated by federal securities laws, with a combined share ownership of 19%.

The aim of the plan was to convey that Kiani had a greater amount of shareholder support than he actually had, and while it increased its stock ownership, RTW simultaneously sold short an equivalent number of shares, thereby offsetting its economic risk, per the complaint. RTW reduced its position back to 2.8% after the record date.

Masimo alleged that Kiani was "in constant communication with RTW about the plan."

"Through these communications, Mr. Kiani provided confidential information that enabled RTW to carry out the empty voting scheme," Masimo said. "RTW followed through on the plan by voting shares representing 9.9% of Masimo's total shares in favor of Mr. Kiani on the same day that Mr. Kiani himself also voted his position."

Masimo alleged that RTW reached out to proxy advisory firm Glass Lewis & Co. to express support for Kiani, purporting to be a 9.9% shareholder in Masimo, but that Glass Lewis noted inconsistencies between RTW's representations and its public filings indicating it held a 2.8% ownership in the company.

By mid-July, Glass Lewis and another proxy advisory firm, Institutional Shareholder Services, both strongly recommended that shareholders vote in favor of the two independent nominees, per the complaint.

Kiani subsequently pushed back the record date and the annual meeting date, and RTW carried out the same scheme on the new record date, Masimo alleged. RTW artificially inflated its voting power, according to the complaint, but the independent nominees still won by an overwhelming majority.

"Though unsuccessful, the practice of intentional empty voting presents a grave threat to shareholder democracy that should not be condoned under the federal securities laws," Masimo alleged. "Indeed, Section 16(b) was enacted precisely to combat this type of abusive short-swing trading by corporate insiders (and their group members) at the expense of shareholders generally."

Masimo is seeking disgorgement from RTW and Kiani of all short-swing profits made by the so-called empty voting scheme.

RTW Investments and counsel for Masimo didn't immediately respond to requests for comment Monday.

Masimo is represented by Michael E. Swartz, Randall T. Adams and Alexandra J. Carlton of Schulte Roth & Zabel LLP.

Counsel information for the defendants wasn't available Monday.

The case is Masimo Corporation v. Kiani et al., case number 1:24-cv-08147, in the U.S. District Court for the Southern District of New York.

--Editing by Leah Bennett.

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